United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

76-1283

B
P/S

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellant,

against

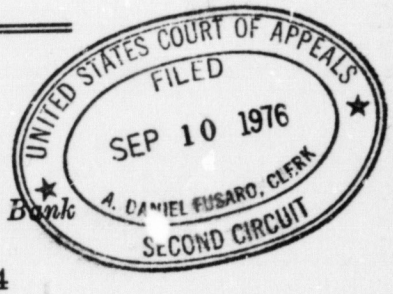
SECURITY NATIONAL BANK,

Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of New York

---

APPELLEE'S APPENDIX



LORD, DAY & LORD
Attorneys for Security National Bank
25 Broadway
New York, New York 10004
(212) 344-8480

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	PAGE
Transcript of Proceedings, March 3, 1976	BA 1
Colloquy	BA 13
Government's Opening Statement	BA 17
Colloquy	BA 18
Testimony of George DeGenaro at Hearing on Bank's Motion to Invoke the Attorney-Client Privilege	BA 42
Testimony of William A. Shea at Hearing on Bank's Motion to Invoke the Attorney-Client Privilege	BA 69
Decision of the District Court Denying the Bank's Claim of the Attorney-Client Privilege	BA 87
Colloquy	BA 89
Government Summation and Related Colloquy	BA 103
Memorandum of Security National Bank in Support of Its Motion to Qualify Mr. William T. Holloran as an Expert	BA 271
Memorandum of Security National Bank in Support of Its Motion Asserting the Attorney-Client Privilege	BA 279
Petition for a Writ of Certiorari by Standard Coil Products Co., Inc. in *Standard Coil Products Co., Inc.* v. *United States* (decided with *Fong Foo* v. *United States*), 369 U.S. 141 (1962)	BA 303

PAGE

Brief for Standard Coil Products Co., Inc. in *Standard Coil Products Co., Inc.* v. *United States* (decided with *Fong Foo* v. *United States*), 369 U.S. 141 (1962) ..... BA 310

Brief for the United States in *Fong Foo* v. *United States*, 369 U.S. 141 (1962) ..... BA 334

Petition for Certiorari in *Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937) ..... BA 347

Security National Bank's Request to Charge, Request No. 7 ..... BA 354

Government's Request to Charge, Request No. 4 ..... BA 357

Government's Request to Charge, Request No. 5 ..... BA 358

Colloquy ..... BA 359

room number one. Would it be possible for your Honor to direct that that room be reserved for the use of counsel so that we canleave things overnight.

THE COURT: The witness room #1 is for the defendant's counsel. It's not for anyone else. The Government has its own.

MR. KATZBERG: Is there another room adjacent to it?

THE COURT: Judge Meahr's.

MR. PATTISON: For the witnesses?

THE COURT: If he has a trial, we will have problems. I don't know about that closet.

MR. COHN: It's such a burden for us. It takes an hour and a half to two hours to come in. If it's not that room, possibly some other room could be assigned to us.

MR. PATTISON: We do not oppose.

THE COURT: I will have to find a room today.

MR. COHN: Also, that we can use as sort of a conference room.

THE COURT: There is one at the end of the hall. I don't think there is any objection to that.

MR. BANNIGAN: On behalf of the Security National Bank, I have an application. At this time I would move to withdraw its previously entered plea

of not guilty, and enter a plea to Nolo Contendere to such counts or all counts of the indictment which the bank is named, and are sufficient to the Court in this matter.

MR. KORMAN: The Government has to oppose all pleas unless there are exceptional circumstances.

THE COURT: That is my understanding, likewise.

MR. KORMAN: We do not have to except it.

THE COURT: First let me have the basic questions and answers by Mr. Korman. I am not making my mind up at all at this point. What would be the probability of obtaining an approval as far as the Corporation is concerned? I realize the defendant's not an individual, and I will not except it. It is a Corporation, but there's a probability.

MR. KORMAN: I don't think we would recommend to the Department of Justice --

THE COURT: You would not?

MR. DANNIGAN: Since it's your decision and not the defendant's decision --

THE COURT: Go ahead, Mr. Korman.

MR. DANNIGAN: One, I contest Mr. Korman's statement. It is the policy of the Department of Justice that it cannot accept a Nolo Contendere. I know of no such policy other than a memorandum which

Mr. Korman showed me, dated 1953, in the book used to instruct Federal Practice somewhere. It is -- whether the policy of the Department or not, it is clearly the policy of Congress to accept such pleas, and the proof of that, Your Honor, is that when Rule 11 was amended last year, the right of a defendant to offera plea of Nolo Contendere,and for a Court to accept, was not out of Rule 11.

Turning to the merits, Your Honor, of the offer, there is no governmental interest to be served by forcing the defendant --

THE COURT: Except the rule, as I read it, is more of a limited restrictive rule on acceptance of such a plea, rather than having been plaster sized in respect reads that in Nolo a defendant may plead only with the consent of the Court which could be myself. Such a plea shall be accepted only after due consideration of the abuse of the parties and the interest of the public in the effective administration of justice.

MR. BANNIGAN: It was to those points I was addressing myself. Mr. Korman has not addressed. He has merely said the policy of the department was not to accept pleas . There's been no policy reason -- if I can continue -- and Mr. Korman wants to treat

it --

MR. KORMAN: I think the position of the Department is based on the notion that the public is undermined by what appears to be special treatment. The parties who were in effect guilty of the crimes charged with, and they appear to be getting off with something less than a plea of guilty, and I think that basically reflects the defendant's policy, and I think the interest of justice is not served generally by permitting Nolo pleas to be entered, barring exceptional circumstances which I don't see in this case.

MR. BANNIGAN: On that score, Your Honor, I would ask Mr. Korman to produce a memorandum or United States official -- or attorney's general memorandum setting forth that policy, a current one, not something done in 1953, which anybody with reasonable intelligence would read and clearly see it was directed exclusively at individual defendants since the memorandum in terms of fines and imprisonment, which obviously the Corporation is not subject to. If I may, Your Honor, I would like to turn to the reasons we believe the --

THE COURT: Let's hear this.

MR. BANNIGAN: One, no Governmental interest to be served by finding this particular defendant guilty. The very simple reason, this defendant doesn't exist

anymore. It is a bank which has gone out of business. There is no deterent factor for a guilty plea. The people in that bank as to the crime alleged in the indictment, whether committed, I don't know. Since the bank is offering to plead Nolo to the entire indictment, it is exposing itself to the maximum punishment which could be imposed, even if the defendant were to go to trial and be found guilty.

I point out, Your Honor, that if the bank is forced to go to trial, aside from the penalties that will be incurred if found guilty, there are, as I am sure you are well aware, rather enormous legal expenses. These expenses will have to be incurred by the stockholders of this bank who have already lost a fortune since this bank went out of business, and are hardly in a position to continue to lose money when the bank is going to accept a maximum fine, pleading, exposing itself to that liability, which is not increased one iota by going to trial.

I say, Your Honor, in light of all those facts there is absolutely no reason why Your Honor should not accept the bank's offer to plead Nolo Contendere in this case.

THE COURT: One question, Mr. Korman. What effect would such a plea accepted by the Court have

on the balance of the prosecution in this case? I

MR. KORMAN: No effect. It would simply eliminate the defendant from the trial.

Mr. Bannigan who is not physically even here, since it can't be.

THE COURT: It's a piece of paper actually. It's a living death at this point.

MR. BANNIGAN: In effect, Your Honor. And what I am organizing to try to save a few breaths of our life that are left in the body.

THE COURT: Let's see if we can find another.

MR. BANNIGAN: I would not make this application if I did not think it was meritorious.

THE COURT: I don't feel like a surrogate in administering a deceased estate. Do you have any other objections to this plea?

MR. KORMAN: Everything Mr. Bannigan said would justify a plea of guilty. As a matter of fact, Your Honor, I have offered them a plea of guilty.

THE COURT:What is the reason for the individual no longer an individual under the entity of law is itself or not wanting to plead guilty?

MR. BANNIGAN: I missed that, Your Honor.

THE COURT: (continuing) -- to the entire indictment, if the end result is the same?

MR. BANNIGAN Quite --

MR.KORMAN: It's actually better for the Corporation, because the offer that I made in terms of a guilty plea would not hold to the entire indictment.

MR. BANNIGAN: There are a number of reasons, sufficed to say, to one:

The bank has approved this by the Board of Directors, and not approved the other operation. Two, there are civil suits pending, derivative actions brought by shareholders on behalf of the bank. Many of the members of the Board, presently on the Board were not members of the Board at the time of these transactions are presently exposed to substantial liability. They are concerned that a plea of guilty might have some effect on that, and I am not in a position to say it won't, and anybody else was.

THE COURT: On the Directors?

MR. BANNIGAN: Or defendant in a civil suit. There are a number in the civil suit. Some not directors of the bank at the time the transactionwas initiated. I think, Your Honor, the compelling reason here for the plea is that the Government cannot cite one reason why it shouldn't be accepted. One compelling reason. It can cite policy and plateaus.

THE COURT: I am really trying to determine what

effect it would have on the public interest, if at la
all. Considerin the legal being that we are speaking
about, and it's a common occurrence for such a plea
to expire. Sometimes without prosecution, completely,
and I don't know what effect such has upon a public,
number one; number two, if it doesn't effect the
prosecution of the proceeding itself, there must be
some harm made to the Government, but to some one,
and I can't seem to find that harm.

I am not leaning towards it, but I would like
to have some explanation.

MR. BANNIGAN: I think Mr. Korman should address
himself to that.

MR. KORMAN: I have nothing more to say. I
am unable, and I have no authority to consent.

THE COURT: I am not considering it for consent.
I realize you can't.

MR. BANNIGAN: May Iadd one other point which
is somewhat compelling. I was advised yesterday
that the Government as part of its proof in this case
will allege that the individual defendants part of
their conspiracy deliberately did not disclose those
or alleged contributions to the Board of Directors.
I think this is a factor and should be considered
here that the Government, the governing body of the

poration did not, on the Government's theory, know what was going on here. I think that's a factor which indicates in my view why they were indicted in the first place, but that aside is a factor which indicates that in the Court's discretion, in the interest of fairness and compassion that the bank, which is the governing body, and the directors should be allowed to withdraw Nolo Contendere.

MR. KATZBERG: Your Honor, just briefly, in this context, the Court will show that Mr. Clifford was the Chairman of the Board of Directors, and that Mr. Lowell was the Secretary to the Board of Directors.

MR. BANNIGAN: I don't think that under cuts what I said.

MR. PATTISON: Nevertheless, the Government body in part --

MR. KORMAN: This is an argument for the jury.

THE COURT: I would like to take a few moments to reflect and to determine what my position will be on it.

MR. BANNIGAN: Thank you, Your Honor.

MR. KORMAN: I have an application to make that you might want to reflect on that at the same time.

THE COURT: Yes.

MR. KORMAN: My consent, Your Honor, is with the

of the considerations I have given it. In any event, I think it would be no problem -- first of all, I don't know the number of jurors that would be from that area that you are speaking of where the bank was located. Number two, rather than to run into a problem of maybe over publicity, which you are alleging, I would only take those jurors in private and discuss merely the publicity part of it and nothing else, and all the balance of it will be performed and discussed with the jurors in open courtroom.

MR. COHN: I won't delay Your Honor any further.

THE COURT: I am going todiscuss as to publicity. Nothing else.

MR. COHN: May I have a chance to discuss it with you later?

THE COURT: Sure.

(Whereupon, a recess was taken at 11:45 A.M.)

(Whereupon, court convened at 12:30.)

THE COURT: All right. I will read into the record my determinations first to the Nolo plea that's been offered, and then the second one as to the count. The first is that the defendant Security National Bank has offered to plead Nolo Contendere to the counts of the indictment in which they are charged with violating criminal statutes.

The Government is opposed to the Court's acceptance of the plea.

This Court has given due consideration to the views of the parties and the interest of the public in the effective administration of justice.

The Court comes to the following conclusions with respect to this crime. There are two ways in which the law seeks to deter corporations and corporate directors from improper conduct.

The first way is through criminal statute, such as the ones where violations are charged in this case.

The second is by providing that corporate directors may be held personally liable in a civil action in the event shareholders are able to successfully prove actionable misconduct. Whether there is a Nolo plea as opposed to a plea or verdict of guilty, will be of significance in a civil action currently pending.

By accepting a plea of Nolo Contendere, the Court would weaken the civil deterrent against corporate misconduct.

In view of this, and the seriousness of the charge here, it would be contrary to the interest of the public in the effective administration of justice

to accept this Nolo plea offered by Security National bank.

Accordingly, the plea will not be accepted.

In reference to Count 15, the Government has indicated that it has no direct proof of pre-election agreement to contribute to Mayor Beame's campaign.

The Court must therefore decide whether this lack of proof requires dismissal of Count 15.

It is concluded a dismissal would be improper. It is conceivable that a jury might infer from the fact of the contribution itself, and from the surrounding circumstances, that the requisite specific intent was present.

Accordingly, the motion is denied.

MR. KATZBERG: Thank you, Your Honor.

THE COURT: Now, I have sent the jury out to lunch. They will be back at 2 o'clock, and we will proceed with the selection of the jury at 2 o'clock.

MR. KATZBERG: Thank you, Your Honor.

MR. RYAN: Your Honor, do you -- I would like to make an application, Your Honor, for additional preemptory challenges in this case. There are four defendants now, and the case is compended to go on for a number of weeks, and they think that under the circumstances of this case that we appropriate, if we

(Discussion off the record.)

MR. BANNIGAN: You will no doubt recall, your Honor, that on Wednesday on behalf of my client, the Security National Bank, I made an application to withdraw a plea of not guilty and plead nolo contendre to such counts of the indictment, or all counts of the indictment in which the bank is mentioned or named to dispose of this case.

At that time in opposition to the motion Mr. Korman stated that it was contrary to the policy of the United States Department of Justice to accept such pleas.

THE COURT: Yes, I remember.

MR. BANNIGAN: And then thereafter when your Honor rejected the plea you stated, I believe, the foundation for the denial basically was that it would have a substantial affect on the civil action.

I bring your attention, your Honor, that yesterday the United States Attorneys Office for the Eastern District of New York accepced a nolo contendre pleas from Pan American Airlines and other airlines in an action.

THE COURT: I saw that.

MR. BANNIGAN: The underlying action of which

was to be sui generis homicide, and it was accepted and Mr. Trager commented on it that these were appropriate and proper pleas, and your Honor, I must say that I am concerned, in light of the representation that was made by the Government here on Wednesday, and I am also concerned, your Honor, in light of the reason given for the denial, since it seems to me that there are certainly individual suits in this action for wrongful death.

Now, if one is talking about jeopardizing civil actions and whoever the judge may have been here, did not think that --

THE COURT: Can I Just say I don't agree with you because I really don't know whether there is an underlying suit for wrongful death because it was an employer and employee situation. You cannot institute a wrongful death action against an employer.

You may be talking about the other three defendants. Or whether or not their underlyin g situation in being indicted here would encomplass a wrongful death action against them, again, I couldn't possibly question it because I don't know.

MR. BANNIGAN: I don't know the answer to it, your Honor, but I would suggest --

THE COURT: At face value I would say that

there is no action.

MR. BANNIGAN: I would suggest that the families of the pilot and co-pilot and flight engineer -- and I will check this out -- have sued Pan American Airways for many millions of dollars. And a lot of other defendants.

MR. KATZBERG: Your Honor, just so the record is clear --

THE COURT: I know nothing about the Pan American indictment.

MR. KATZBERG: Your ruling was based not only on the civil action but public policy grounds as well and the opposition of the United States Attorneys Office. That was only one basis of your refusal to take the plea.

THE COURT: I didn't place as much weight on the opposition of the Attorneys Office as I did on the public interest that was involved.

If you read my opinion you will find that the weight was centered about that.

MR. KATZBERG: I wanted to make sure the record was clear that the basis for your holding was certainly more than one specific basis that Mr. Bannigan alluded to.

THE COURT: I do note your exception once again.

MR. BANNIGAN: I would ask your Honor --

THE COURT: And you -- proceed.

MR. BANNIGAN: I would ask that this be marked as part of the record.

THE COURT: Yes, it will be marked. I read it myself.

And I'd be remiss not to tell you that when I read it I also reflected on this case.

THE CLERK: One-page document marked for identification as Court Exhibit 7.

(So marked.)

MR. NAFTALIS: Good day, Judge.

(The following occurred in the Courtroom.)

THE COURT: Now, before we start the selections again this morning, there is only one particular item to be taken care of for the jurors who were not in the courtroom at the time that the defendants were introduced, they will be introduced to you by their attorneys this morning.

MR. NAFTALIS: Thank you, your Honor.

I believe I introduced myself yesterday. My name is Garry Naftalis and I am the lawyer for Mr. Patrick Clifford who's the gentleman on my right

Again, the Government will offer the banking records to show those salary increases and you will be able to see those increases and you will hear from the officers who received them and they will explain to you how it worked.

So, by late 1970, the evidence will show there were over 40 officers in the club. The club was producing over $4,000 in checks drawn to each recipient individually or club or committee.

Anybody looking at any specific contributions, however, would see what appeared to be contributions of individuals out of their own checking accounts, when in reality these contributions were nothing more than disguised bank funds. Though the contributions on the face of it appeared to be made on the choice of the officer who wrote the check, the recipients of these checks were choices of Mr. Clifford, Mr. Dowd and Mr. Powell and the officer who wrote the check was nothing more than a pawn in this scheme.

The evidence will show that this clever system by late '70, early '71 was producing results. The evidence will show that the political contributions increased the bank's municipal

18

Langdon-redirect

MR. COHN: I will object to that.

THECOURT: Sustained.

MR. KATZBERG: I have nothing further, your Honor.

THE COURT: All right, you may step down.

MR. [illegible]TALIS: One second, your Honor.

(Pause.)

MR. BANNIGAN: No questions, your Honor.

THECOURT: You may step down. Thank you.

MR. KATZBERG: Your Honor, the Government's next witness is Lawrence Playford.

MR. BANNIGAN: Your Honor, we have some matters to discuss with you in connection with this witness. I believe they ought to be discussed outside the presence of the jury.

THE COURT: All right, take the jury out for a moment. You may step out.

(Jury leaves courtroom.)

MR. BANNIGAN: The witness who made this is not in the room?

MR. PATTISON: No, he is not.

MR. BANNIGAN: Your Honor, we object to the introduction of this drawing on the grounds that we understand the foundation for it to be that an FBI

agent was given all of the checks that were written from the Jaeger account, the Arthur Chadwick account, that he added them up and came up with these figures for each of the calendar years indicated.

Your Honor, there is no question with respect to some of these checks that were sent to the parties, the bank received value for its services, journal ads, some of which have been marked here. That is perfectly legal. They went to dinners and got a meal. To the extent that that meal cost anything, that must be deducted from the contributions.

There are a substantial number of checks which have been marked for identification and never put into evidence, those that Mr. Chadwick was unable to recall. They are included in the figures here and we submit, your Honor, that there is no foundation for this chart to go in in its present form.

MR. NAFTALIS: May I supplement that and then the Government can answer?

Your Honor, the records of the Jaeger account -- what they have done here is take all of the disbursements out of the Jaeger account and the Chadwick account and the Long Island Public Affairs account and add them up and come up with the total and lebal them all contributions. The records of the Chadwick account

indicate a substantial number of people who contributed. Under the Government's theory of this case, only those people -- I am taking the Government's theory and I am not necessarily agreeing with it -- an officer who got a raise to make a contribution, that is an indirect bank contribution. I think that is a simple way of saying the Government's theory.

THE COURT: Yes.

MR. NAFTALIS: An officer that did not receive a raise for the purpose of making a contribution, it is not a contribution of the bank, and it is a perfectly legal contribution that he makes. The Government itself has conceded in its opening statement that at least three officers of the bank, whose checks are included in that total there, Mr. Clifford, Mr. Dutra and Mr. Stefan, were all non-reimbursed contributors or received no raise or compensation.

In addition, there are a large number of other people who are listed as contributors and are part of the records in this case. Another one is Mr. Spitzbart who the Government said in their bill of particulars was not reimbursed, and sums from Mr. Spitzbart are also in here.

Mr. Corriss is included in there, even though

he testified in the grand jury and indicated to Mr. Katzberg in his interview that his raises were not in any way connected.

MR. KATZBERG: It was not definitely connected when he received it.

MR. NAFTALIS: In addition there are a number of other people listed as contributors and there is no evidence in this case that they have received any salary increases or reimbursements whatsoever. I can read them into the record at some appropriate time.

Anyone whose Visi card is not in evidence, there has not been a link. I do not know what the exact figures are. I mean, I have to assume that the FBI agent did his addition correctly -- I do not dispute his figures -- but these certainly are not contributions from the Security National Bank. The contributions to be accurate in the first instance must only include those people that the Government introduced evidence of receiving reimbursement.

I would endorse Mr. Bannigan's remarks in this connection with journal ads as reasonable advertising expenses.

With regards to the dinners, granted if you buy a $50 dinner --

THE COURT: It may very well be that the portion

of the journal that is reasonable is the printing.

When they solicit, they solicit funds for the organization, and the journal is a demonstration of one's willingness to contribute. I do not want to hide behind a cloak and say I do not know that.

MR. NAFTALIS: With regard to the dinners --

THE COURT: I have been to many of those dinners.

MR. NAFTALIS: I have been to similar types and I concede the food was bad.

THE COURT: A $100 dinner is worth maybe $12, six years ago it was worth $6, and you got $3.50 worth.

MR. NAFTALIS: Let us assume for example that the officers paid $50 a plate for a dinner for the XYZ political committee. Granted the meal was awful --

THE COURT: It all does not go towards the dinner.

MR. NAFTALIS: Say $10 or $5 or some figure which the Government ought to be obliged to prove went for the value of the meal. If they had gone in and bought $5 tickets or $10 tickets, none of it would be a contribution because it was all for the meal, whether it be for the Democratic organization, Republican organization, Conservative organization.

THE COURT: They would find a way to make a

profit.

MR. NAFTALIS: I was raising that as a hypothetical situation. I agree it bears no live relationship.

It seems to me for the Government to put in a chart and to say that every dollar went for a contribution --

THE COURT: Let me hear what you have to say?

MR. KATZBERG: This chart was made up based upon documents already in evidence in this case. The records consist of the Jaeger monthly statements and checks, the Long Island Public Affairs Club monthly statements and checks, all of which is in evidence, and finally the chart was made up based upon the Arthur Chadwick records, all of which are in evidence. All this chart is is a summary of the documents and records which are already in evidence.

The Government would have no objection, if the Court deems fit, in instructing the jury that not all of that money represented on that chart was from officers who were paid salary increases.

THE COURT: That some of it was legal?

MR. KATZBERG: All the chart is intended to do is show the total amount of monies that were generated from these accounts in the years in question and is

nothing more than a summary of the other documents and records already in evidence.

MR. NAFTALIS: If your Honor pleases, the problem with Mr. Katzberg's statement -- I do not dispute any of the figures on the chart. I am sure his agent added up the checks accurately. The problem is that a good percentage -- and I do not know how much of the dollar value in that chart should not be on the chart, because the representative people -- which there is no evidence were reimbursed and therefore could not be bank contributions -- for them to put up a chart that says $293,000, when maybe half of that figure does not belong there --

MR. KATZBERG: Not half.

MR. NAFTALIS: -- as contributions by the Security National Bank.

If they want to have an accurate chart as to their theory of the case, but based upon the checks and the evidence as to those people that they claim were reimbursed, they have a perfect right to do so. I may not like it, but they have a perfect right to do so. This is not an accurate chart. That kind of a figure --

THE COURT: Under the law demonstrative evidence is definitely admissible as far as instructing

the jury as to the compilation of the evidence. There is no question about that. The question is whether the demonstrative evidence can be fairly assessible by the jury.

If it does not, it is not admissible. It is like putting in a picture of a person in a fire showing he burned his thumb and then went somewhere else and burned his face. You cannot get that into evidence. You can get in the thumb, but not the face.

MR. KATZBERG: This is a summary of things already in evidence.

MR. PATTISON: Maybe we could just -- I think the point is:

That we'd ask that the Court clarify the chart and may instruct that this represents Jaeger records, Government Exhibit so-and-so, Chadwick records, Government Exhibit so-and-so. That furthermore there is no evidence that Mr. Dutra, Mr. Stefan, Mr. Clifford received raises for their share of that amount of monies, approximately $100 a month.

Now with that instruction I think that it is perfectly accurate and it is again we must emphasize this fact that if the jurors were to make up a chart of their own based upon the evidence here, they would come up with the exact same chart because it is all

26

represented here.

MR. NAFTALIS: Your Honor, the problem is what is relevant in this case and what is accurate in this case.

Every check that went out of that account is not a contribution of the bank, because among -- not only is there no evidence that Mr. Clifford's, Mr. Dutra's, Mr. Stefan's contributions are improper, there is no evidence as to Mr. Robert Burke, Mr. Steven Corriss, Mr. John Colson, Mr. Donald Colkin, Mr. Hackett, Mr. Rex Johnson, Mr. James Coopman, Mr. William Lowe, Mr. John McInerney, Mr. Wilbert Crivage, Mr. W. Robin Robinson, Mr. Lawrence Steele, Mr. Frank Ward, Mr. Douglas Wulffleff -- none of these people have testified. Their checks are not in evidence. There is no evidence -- they're all included here.

THE COURT: What does that total amount come to?

MR. NAFTALIS: I do not know.

THE COURT: Could we get a chart showing the total amount of those?

MR. KATZBERG: I would say in that connection, at most -- at the very most, one-third of the officers who contributed to this fund, there has been no proof in this trial were reimbursed.

THE COURT: Yes.

MR. KATZBERG: Were reimbursed. I would say at the most, that --

MR. NAFTALIS: That's a hundred thousand dollars.

THE COURT: Does it mean a hundred thousand?

MR. KATZBERG: It will mean ninety some-odd thousand dollars.

THE COURT: Off?

MR. KATZBERG: Yes. But what I'm saying --

THE COURT: Tnat leaves 200,000.

MR. KATZBERG: So that the figure is approximately $200,000 of provably illegal contributions.

THE COURT: Why don't you do this, then: You can show total contributions without -- with the Court advising the jury that the total contributions of -- that have been assessed is 293,000 plus.

However, of that amount, you should have anothe chart indicating that XYZ is included therein, which totals 93,000 and that should not be taken into consideration as illegal.

MR. KATZBERG: Fine.

If your Honor would so instruct the jury?

MR. PATTISON: May I be hard?

I don't think it's quite as clear as all

that.

THE COURT: I don't know whether it is clear or not.

MR.PATTISON: That only the officers who appeared here and whose checks were offered into evidence are the only officers whom we may assume were in fact reimbursed.

THE COURT: Right.

MR. PATTISON: I think that there is evidence that Primosch was approached, for instance.

MR. NAFTALIS: Call him.

I'm sorry.

MR.PATTISON: The fact that we have -- that we chose a certain method of proof as to some of the officers I think that it's a perfectly rational inference, for instance --

THE COURT: You see --

MR.PATTISON: Your Honor --

THE COURT: Go ahead.

MR. PATTISON: There is in evidence a memo from Mr. POwell to Mr. Mause that the following officers received this date $1700 salary raises, some of whom did not appear here.

Now, when you take that memo, couple it with the Chadwick's records, which show that thereafte

3

their checks started to come in 100 bucks a month, I feel that all of this adds up to a reasonable inference, which the jury may draw based on all of the evidence, that the only reimbursed officers were not just the ones that appeared here, but that as has been said, time and time again, the total members in the club came up to approximately 45 officers.

That has -- there is evidence of that fact. I think that --

THE COURT: That may be so but what is the total contributution made by these members?

MR. KATZBERG: I would say, Judge, the figure that I gave you, that at the most, one-third of that figure, at the very most.

THE COURT: Why can't you make another chart showing the total contributions and then separating from that the voluntary, or legal?

That's a very difficult word. I don't know of any other way of saying it. If I give a contribution to someone, it's my own money, it's voluntary. What else can I call it?

MR. KATZBERG: If you knew what it took to get that chart in the first place.

THE COURT: Of course, I know what it took.

4 A lot of wo[illegible].

MR. KATZBERG: You would understand the difficulty in producing a subsequent one.

THE COURT: If I'm in error in permitting it to be seen by the jury, it takes a lot more than the amount of time expended to make that chart. It takes a whole new trial of six weeks and God knows how much money is involved.

MR. KATZBERG: My only point is that I think --

THE COURT: I'd rather be right now than wrong later.

MR. KATZBERG: I agree.

Obviously, we have no desire for the Court to make an erroneous ruling at this time.

THE COURT: A one-week trial I won't mind.

MR. KATZBERG: I think it is perfectly fair and perfectly appropriate, your Honor, that if and when the chart goes in, your Honor instruct the jury that this chart is a total chart which does not break down for the jury those contributions for which the officers were paid and those which were not and that they can, in viewing the chart, --and they must in viewing this chart --

THE COURT: But they would be entitled to

know visually as they see that chart exactly whom those persons are that made these contributions into these accounts and I assume --

MR. PATTISON: They know, Judge. That's in evidence.

MR. KATZBERG: It's already in evidence.

THE COURT: I understand that.

MR. RYAN: We can't pick up --

MR. KATZBERG: That's evidence.

THE COURT: But they are not --

MR. RYAN: They won't --

THE COURT: If you are willing to have them visualize what the chart says there is no reason why they shouldn't have visual opportunity as to those who did contribute but not in violation.

MR. PATTISON: That's only three or four men.

THE COURT: Fine. Put three or four men.

MR. PATTISON: No.

MR. NAFTALIS: You've proven -- you have not proven that.

MR. PATTISON: We have. It's a reasonable inference --

MR. NAFTALIS: They have a burden of proof, your Honor, beyond a reasonable doubt. Not just what

might be so.

If your Honor please, they want to put a chart in and we all know and your Honor knows better than all of us the effect of graphic evidence on juries.

It ought to be an accurate chart and it ought to be based onthe checks that are in evidence from those people.

Let me finish, please.

THE COURT: Don't you understand the jury can draw an inference from the $293,000 whether I tell them or not, that somehow or other they did it because somebody told them to do it and they have a right to draw that inference from a material fact in the case. That's bad. That's wrong.

Because the inference should not be drawn. That's what's wrong with it.

I could talk to them until Doomsday and I say, please don't draw an inference as to those people giving those contributions, they are going to do it anyway.

They'll think about the closet we talked about.

MR. PATTISON: They should, with the exception of those in light of all of the facts

7 shown here, documented persons who were not in fact --

THE COURT: What is so difficult? I don't expect a beautiful chart such as that to be brought in, but why not bring in a chart maybe on a piece of cardboard, maybe ten by twelve, where you put down John Jones, Harry Smith and you want to make a black line; fine.

If you don't want to make a black line, do something.

MR. NAFTALIS: It's almost the end of the day. They can go back to their office.

MR. KATZBERG: Mr. Naftalis knows that's ridiculous.

THE COURT: What?

MR. KATZBERG: That within any reasonable period of time ---

THE COURT: Will you give me the names and I'll tell the jury.

MR BANNIGAN: The government can't come up with an accurate chart then I move they can't put any chart in.

They've been arguing about this. You've ruled in effect, your Honor.

THE COURT: I'm too certain it is not

8 admissible graphically and visually to the jury, of course they are not going to bring it in the jury room at this point.

I think it is a very bad chart.

MR. RYAN: This case is whether the bank contributions are individual contributions and look at the title of that chart.

It says, "Security National Bank Contributions."

THE COURT: I saw that.

MR. RYAN: It's for the jury to decide.

THE COURT: I was waiting for someone to say something to me.

MR.PATTISON: Your Honor, that is in every tax case they put "Income Reported, Unreported." That, of course --

THE COURT: Tomorrow morning you add on, "et al."

That may help the situation.

MR. COHN: I think it would help if we took "Security National Bank"off the top and just leave it "Contributions" and it's for the jury to decide whether these contributions --

THE COURT: Take"Security" off and leave the chart as it is.

MR. BANNIGAN: No, your Honor. I object.

I want an accurate chart. That's all demonstrative evidence is, accurate evidence.

MR. KATZBERG: That's an accurate summary of documents already in evidence.

THE COURT: Accurate as far as contributions were made.

MR. PATTISON: Yes.

THE COURT: It's not accurate as far as contributions made in violation of the statute. That's important.

MR. KATZBERG: And so if the jury is so instructed there is no problem.

MR. BANNIGAN: They'll not remember the instruction no matter how persuasive the Judge is and he's very persuasive.

They'll remember the chart.

THE COURT: I am afraid of the inference they can draw from that.

MR. RYAN: A picture is worth a thousand words no matter what your charge is. That picture tells some story.

MR. PATTISON: Your Honor, I think that it is a reasonable inference to draw.

THE COURT: I say, you can use that chart but then you must have something else to indicate

10 the contributions made not in violation of law that were contributed into those accounts.

MR. KATZBERG: Your Honor can so instruct the jury.

MR. PATTISON: Your Honor, with reference to that, we would have approximately four names. That's all.

THE COURT: Fine.

MR. PATTISON: I think that with reference to the other officers that have been -- that have been mentioned in light of all of the evidence here, I think it's a reasonable inference that all of the officers who got a $1700 salary raise on the same day and who, thereafter, started paying $100 a month, that they were part of the club and so those officers --

THE COURT: I would say that's a reasonable inference. If they received a raise, a reasonable inference is because of the nature of the charge that's been made and the proof that has been submitted it will be reasonable to assume the $1700 was given for political contributions.

MR. PATTISON: Your Honor, I think this case could have gone on for another six months had we called every one of them.

11

MR. NAFTALIS: The problem is that your Honor --

MR.PATTISON: A pattern was shown.

MR. NAFTALIS: We have done some interviewing of some of the other people the Government chose not to call and we find they are not as helpful to the Government as the people they called.

THE COURT: You call them.

MR. NAFTALIS: Yes.

THE COURT: If you think it is not helpful to the Government, the only converse statement the Court can make is they must be helpful to you. Or neutral.

MR. NAFTALIS: No.

I'm saying some were helpful. I'm not trying to suggest that they had an obligation to call everybody in the case. They have an obligation to call the witnesses they think are helpful to to their case. That's all.

Let me finish, please. What I am suggesting is that witnesses who they do not choose to call because they are not helpful to their case they can't be put up on a chart and rely on their monies when it turns out that those people may say

11 things which contradict the Government's theory of the case and the Government knows it and still expects to relyon their expenditure --

MR. PATTISON: The only ones --

THE COURT: Those witnesses that received a $1700 contribution, even though they have not testified a reasonable inference can be drawn by the jury that the raise was given for the purpose of making contributions in violation of law.

MR. NAFTALIS: Your Honor, there are more than four people.

THE COURT: Whoever.

MR. NAFTALIS: Who did not receive $1700 raises.

THE COURT: How many are there?

MR. NAFTALIS: Let's start with: Mr. Clifford, Mr. Collis, Mr. Lowe.

MR. COHN: Can we finish tomorrow? I am really beat.

MR. NAFTALIS: Mr. Lew. Mr. Wulffleff.

MR. PATTISON: Some of them received $5000 raises after having --

THE COURT: Tomorrow morning.

MR. PATTISON: It's the same as the others.

MR. BANNIGAN: The Government is beyond a

13 reasonable doubt here. Not inference that somebody got a raise. Therefore, if he got a raise it's like somebody else. He must have been in the club.

I don't think it's necessarily a reasonable inference. Not when you are putting demonstrative evidence in.

THE COURT: But it is an inference.

MR. NAFTALIS: On an exhibit like this, your Honor? They can argue to the jury, that's one thing. We can argue the counter-inference but the chart says things that are not supported by the evidence and the chart is a very devastating document.

I would --

THE COURT: Would you agree that 93,000 of that is not in violation of law as contributions?

MR. PATTISON: Well --

MR. RYAN: At this time you cannot say?

MR. BANNIGAN: They don't know how much.

THE COURT: I would say far less than that. I would say --

MR. KATZBERG: As an outside figure, a very generous figure.

MR. PATTISON: $10,000 is closer.

14 MR. BANNIGAN: I would object until -- the exhibit going in until it knows exactly.

THE COURT: It doesn'g go anyplace if it is marked.

MR. BANNIGAN: The jury sees it. That's enough.

THE COURT: We will recess until tomorrow morning.

MR.PATTISON: Very sell.

We will all think about it overnight.

MR. COHN: Judge, before you recess, can I prepare you for an application that I am going to make tomorrow morning so that your Honor --

THE COURT: You want to prepare me tonight for it?

MR. COHN: Yes.

MR. RYAN: Yes.

MR. COHN: Judge, Mr. Ryan will not be here tomorrow as you know and we have agreed and it is okay with his client that I can represent, only for tomorrow, Mr. Powell and Mr. Dowd.

But let me say this: The present thinking of Mr. Powell and -- I'm sorry -- Mr. Ryan and myself that we want to subpoena Mr. Shea nad Mr. DeGenaro as witnesses, defense witnesses.

Q Now, the information fair and accurate summary of the info upon the records you have already iden

A In my opinion, it is.

Q Did you have an opportunity facts and figures on that chart with the fa in the underlying records?

A Yes sir, I did.

Q Is it fair to say that that chart is a fair and accurate description of the total figures that you came up with with respect to those records?

A Yes.

MR. KATZBERG: At this time the Government would offer into evidence Exhibit 181.

THE COURT: All right.

MR. KATZBERG: May I take it off and have it marked?

THE COURT: Just leave it there. We will put a tag on later.

MR. KATZBERG: Thank you.

THE CLERK: Government Exhibit 181, previously marked for identification now marked in evidence.

MR. KATZBERG: Thank you, Your Honor. I have nothing further at this time.

before you, sir?

A Yes.

Q The first item requires, does it not, the production of all memoranda, correspondence, requests for opinions and other records made by you and members of your law firm directed to or received by you or any member or employee of the law firm from officers or employees of the Security National Bank relating to the subject of political contributions during the years '66 through '74, correct?

A I am not sure whether it's the first item. One of the items, Mr. Ryan.

Q All right. Let's take one item at a time. The first item, do you have it before you?

A Yes.

Q Do you have all the records in response to the subpoena?

A The records that I could find in my files.

Q Would you please produce them.

A I would like to state at this time, Mr. Ryan, that my firm has been counsel for Security National Bank for some time. The records --

Q Since '66?

A Since '66. The records I have with me involve matters of privilege. Privileged communication between

counsel and the client.

Some question has been raised as to whether I have a right to produce these documents. I will produce them if the Court orders me to.

THE COURT: All right. At this point, do I understand you, then, to be asserting a client-attorney relationship?

THE WITNESS: Your Honor, I am not sure whether I have a right at the present time to assert that relationship.

THE COURT: But as an attorney you have the right at all times to assert whether or not there is a privilege of attorney-client relationship. And if that be so, the Court then has a right to interrogate you outside the presence of the jury to determine whether or not that relationship exists and privilege attaches.

THE WITNESS: I assert the privilege, your Honor, to the extent that it may exist at the present time.

THE COURT: Are you asserting it on behalf of yourself as the attorney or on behalf of the party as your client?

THE WITNESS: I am asserting on behalf of the client. I have no right to assert it on the --

MR. COHN: May we have him identify the client?

THE COURT: Who is the client?

THE WITNESS: Security National Bank whom we represented for many years.

THE COURT: This Court will recess at this point to determine whether or not there is a client-attorney privilege, which is a matter which must be taken at this point outside the presence of the jury as to whether or not he can waive that privilege in behalf of his client. If he can not, of course, the ruling would be that he not testify. If he can, then, of course, the ruling would be otherwise. It must be for this Court to determine that on a hearing.

All right. I will excuse you for lunch.

MR. NAFTALIS: Your Honor, may I see you at the side bar?

THE COURT: All right. Just sit there.

MR. NAFTALIS: I have a personal problem.

(The following took place the the side bar.)

MR. NAFTALIS: Your Honor, may I renew my application for an important substantive relief. Just get me off this afternoon so I can go to my lecture.

MR. BANNIGAN: Your Honor, if I may --

THE COURT: I am not saying anything.

MR. BANNIGAN: When we go outside the presence of the jury I am sure you will want to ask him questions. I would like to askon a voir dire as to whether he discussed this with the client and so forth, and whether he has authority to speak on behalf of the client.

THE COURT: I think, Mr. Bannigan, that you need not accede to what I am going to say, but I think it would be easier if you permit me to ask the questions not as an advocate, but as in a judicial hearing to determine whether or not there is a privilege. That's number one. And then whether or not he can waive or whether or not he can represent that he cannot waive it since the client has given permission to do so. These are the three essentials. If I find one, the way I told the jury --

MR. NAFTALIS: Your Honor, let me, before you get to the merits --

THE COURT: I have been through these things.

MR. NAFTALIS: This has nothing to do with the merits. Would you Consider excusing the jury now, and then we will have our hearing. And then, whatever your Honor -- you can resolve the principal problem. And then that will give me time to get up

MR. KATZBERG: Thank you, Judge. We'll adjourn awaiting Judge MacDonald.

THE COURT: We'll take a short recess.

MR. KATZBERG: Thank you, your Honor.

(Recess taken)

(The following occurred in the absence of the jury)

THE COURT: Ready.

Mr. DeGenaro, please.

MR. COHN: Your Honor, may I move closer to the bench?

THE COURT: Sure. Why not.

MR. BANNIGAN: Your Honor, so that the air can be cleared here, we've had some discussions with Mr. DeGenaro and his partner and I assume counsel in this matter, Judge MacDonald who is sitting in the courtroom and it is their view that if the privilege exists, it is mine to assert so for the record. I am claiming it on behalf of the client.

THE COURT: All right. Definitely. If you don't assert -- are you going to participate?

MR. MAC DONALD: May I say one thing? I have spoken with Mr. DeGenaro, who is my partner. In this action we are not the attorneys for the bank.

The privilege rests with the bank and not with him.

THE COURT: Right.

MR. MAC DONALD: And that he has nothing to say, whether he waives it or asserts it. It's up to your Honor to rule as to whether or not the privilege exists. Under all of the circumstances.

THE COURT: I must find out first whether or not the bank consulted Mr. DeGenaro and whether or not the consultation was on the basis of attorney and client and the bank claims they did not waive.

MR. MAC DONALD: I'm here to be of what assistance I can be.

THE COURT: All right.

Now, Mr. DeGenaro, when you were sworn this morning and the Court asked you whether or not you invoke the privilege, you said you did invoke the privilege. In behalf of your client.

THE WITNESS: If I may, your Honor. Rephrase that.

THE COURT: All right.

THE WITNESS: I would have refused to answer until my client indicated to me whether it waived the privilege or permitted -- or invoked the privilege.

THE COURT: All right. At this time have you spoken to anyone who has given you any permission to waive?

THE WITNESS: I have not.

THE COURT: All right. Did you at one time appear before a Grand Jury?

THE WITNESS: Yes.

THE COURT: Did you appear before the Grand Jury in behalf of any person or for yourself?

THE WITNESS: On behalf of myself and my law firm.

THE COURT: And your law firm. Did you appear in behalf of the Security National Bank at that time?

THE WITNESS: No, I did not.

THE COURT: Did you present any records that were part of your -- the Security National Bank itself?

THE WITNESS: I presented records which were communications between my firm and Security National Bank which were in our files.

THE COURT: All right. Prior to bringing those records to the Grand Jury, did you consult with anyone?

THE WITNESS: I consulted with my partner, Judge MacDonald and Mr. Shea, my senior partner.

THE COURT: All right. Did you at any time consult with anyone in the bank itself as to whether or not it would be -- they would waive your presentation of these records?

THE WITNESS: I did not.

THE COURT: Now, at the time you consulted with Mr. Shea, was Mr. Shea chairman of the board of the Security National Bank?

THE WITNESS: He was a director, your Honor.

THE COURT: A director. Did Mr. Shea and yourself have a conversation as members of the partnership or did you have a conversation with Mr. Shea representing the bank at the time?

THE WITNESS: I would say that the conversation that I had with him was with respect to what the firm should do with respect to its own records and the testimony of its lawyers -- its partners in the Grand Jury proceedings. What position we should take.

THE COURT: Now, did you bring, however, these records to the Grand Jury then without consultation with any person from the bank?

THE WITNESS: Yes, I did.

THE COURT: And did you give them to the Government at that time for their perusal?

THE WITNESS: Yes, I did.

THE COURT: And were you questioned on these records that you brought?

THE WITNESS: Yes, I was.

THE COURT: And did you at that time assert any privilege as far as your client was concerned?

THE WITNESS: No, I did not.

THE COURT: Did you make any statement in reference to asserting the privilege?

THE WITNESS: I did not assert privilege on behalf of the bank.

THE COURT: On behalf of the bank?

THE WITNESS: Yes.

THE COURT: Were you asked at that time whether or not the bank had requested that you assert a privilege?

THE WITNESS: I don't recall. Let me think a moment, your Honor. The question is, was I asked whether the bank had requested I assert the privilege? I was not asked that question.

THE COURT: Any time that you were consulted, were you consulted by any member of the bank

representing the bank in reference to these records?

THE WITNESS: No, sir.

THE COURT: Were these records made after consultation with members of the bank in reference to the matters presently before the Court?

THE WITNESS: The records were copies of --

THE COURT: As far as contributions are concerned, I'm talking about --

THE WITNESS: There are copies of my firm's records and they were made pursuant to subpoenas served.

THE COURT: Pursuant to subpoenas. All right. Did you at any time talk to either the president, the vice president of the bank with reference to giving either testimony or information in reference to the records that you had in your possession?

THE WITNESS: Not that I recall, your Honor, no.

THE COURT: Do you know whether or not any other member of your law firm received any statement from anyone that they could waive the presentation of these records?

THE WITNESS: I do not know that.

THE COURT: Now, were you the person that

was consulted in reference to the rights or understanding of whether or not contributions could be made in the form they were eventually made?

THE WITNESS: I was the man who was consulted by the bank in connection with questions involving the purchase of tickets to political dinners or advertising in political journals, yes.

THE COURT: Was there any person presently being charged that consulted you as to the rights, the propriety of making such contributions in view of the United States laws?

THE WITNESS: Yes, in this room you mean?

THE COURT: Yes, in this room.

THE WITNESS: Yes. There are gentlemen in this room who did consult me on that question.

THE COURT: Who is that gentleman?

THE WITNESS: I think Mr. David Dowd certainly and I'm relatively certain I discussed it at one time with Mr. Frank Powell.

THE COURT: Did you ever consult with Mr. Clifford about it?

THE WITNESS: Not that I can recall.

THE COURT: And at the time that you had this consultation with these persons, was it as

individuals or were they persons representing the bank?

THE WITNESS: Always in representation of bank officers.

THE COURT: As bank officers?

THE WITNESS: Yes.

THE COURT: All right. As bank officers, did you accept the fact that whatever they were discussing with you, they were discussing on -- for the purpose of instructing the bank itself? Which is a corporate entity as we know?

THE WITNESS: Yes, your Honor. I always felt they were acting in their capacity as bank officers to determine what was best for the bank.

THE COURT: I see. All right. Now, at any time prior to going to the Grand Jury with the records, did you speak with either Mr. Dowd or Mr. Powell in reference to these records being presented for the purpose of investigation before a Grand Jury?

THE WITNESS: Not Mr. Dowd.

THE COURT: Without telling me what you spoke about, of course.

THE WITNESS: I don't think -- not Mr. Dowd

and I don't think I spoke to Mr. Powell, although Mr. Powell and I had a lot of conversations on current bank matters at the time. I doubt that I discussed this with him.

THE COURT: Prior to bringing these records to the Grand Jury, did you ever speak to Mr. Clifford, wherein he would speak to you and not -- and give you permission to submit the records to the Grand Jury or to the Government?

THE WITNESS: I have no recollection.

THE COURT: No recollection of that. Did you take these records then from your office which were made part of a client and attorney situation or consultation, did you take them only by reason of the fact you had conversation between yourself and two other -- two members of the firm?

THE WITNESS: That's correct, your Honor.

THE COURT: Did you at any time discuss the right to -- or rather, the -- did you ever discuss consulting with the persons who may be affected by bringing these records to the Grand Jury?

THE WITNESS: I discussed with my partners, Judge MacDonald and Mr. Shea, whether we should assert the privilege with respect to these documents

because they are lawyers --

THE COURT: As between yourselves, of course, this was in a client privilege situation?

THE WITNESS: That's correct.

THE COURT: As between yourselves, did you find that there was any reason why he should not present those records on a client-attorney privilege basis?

THE WITNESS: No, we didn't think there was any reason why we should not present them, not based on the discussion that we had.

THE COURT: Were you told at any time as a -- in a client-attorney relationship, that you were not to reveal any of these records to anyone?

THE WITNESS: No, I was not.

THE COURT: Do you presently today assert that your client has either suggested or requested of you other than today not to present these records?

THE WITNESS: Only today I've been advised by Mr. Bannigan.

THE COURT: Did you think it proper at the time that you presented these records to have consulted with your client, the bank, with whomever that might have been, before presenting these

records as to a waiver of privilege on their part?

THE WITNESS: Your Honor, at the time I had the documents prepared, I had discussed it with Mr. Shea and Judge MacDonald and I had assumed that a discussion had been had with -- I'm not a criminal lawyer, your Honor. I assumed that discussion had been had between Judge MacDonald and Mr. Shea as to the reasons for not asserting, whatever privilege we had the right to assert, and that there was no reason why we should assert the privilege. I relied on the advice I received from my partner and appeared before the Grand Jury.

THE COURT: Would you say that one of the reasons might have been that this being a corporate entity, there was really no one that you could get a waiver of that privilege from?

THE WITNESS: No, I would not say that is the reason.

THE COURT: You would not say that. Well, when you deal with a corporation, you must have someone of authority in order to permit you to do something as an attorney?

THE WITNESS: Yes. That would have been the board of directors that could have been consulted.

THE COURT: Board of directors. Well, at the time that you spoke to Mr. Shea, did you believe you might have been speaking to him both in the capacity as a partner in the law firm and as a member of the board of directors?

THE WITNESS: No. I had no reason to believe that he was acting as a director under those circumstances, your Honor. I don't know whether he had ever consulted the other directors or not. I just discussed with him, lawyer to lawyer, partner to partner.

MR. KATZBERG: May I inquire?

THE COURT: You cannot inquire. You can ask me whether or not you have a question because it is not your privilege that is being asserted. Mr. Bannigan can inquire if he wished because it's his client that is asserting the privilege.

MR. BANNIGAN: Your Honor, I think you've had very thorough inquiry. I think it's established -- one question.

THE COURT: Don't get carried away.

MR. BANNIGAN: I'll ask you to ask one question, your Honor. At the time of your conversation -- may I approach the side bar on this?

THE COURT: I don't think it's necessary.

MR. BANNIGAN: I think it may be, your Honor. I wouldn't do it unless I thought it was necessary.

THE COURT: All right.

(Side bar follows)

MR. BANNIGAN: Your Honor, I realize that -- obviously this is a public hearing. On the other hand, at one time a gentleman whose name has come up frequently in this case was a target of an investigation and that was Mr. Shea. No charges were brought against him. And I see no value in having that come out before the press and everybody here.

THE COURT: I am not talking about that.

MR. BANNIGAN: That's my question, will be tomorrow, at the time he discussed this with Mr. Shea, was Mr. Shea concerned that he was perhaps target of this investigation. I just wanted to -- the purpose -- it's relevant for the simple reason that --

THE COURT: No.

MR. BANNIGAN: Can I be heard as to why?

THE COURT: Yes.

MR. BANNIGAN: If a director, assuming that

one director and I am not conceding this but assuming that one director could, under some circumstances, waive the privilege, in this case, that would not apply for the very simple reason that as a target of the investigation, Mr. Shea's interests were clearly adverse to the corporation.

THE COURT: No, I don't think so.

MR. PATTISON: Your Honor, I would say that that would be all of the more reason why it would have been asserted. That only cements the reason to assert it.

THE COURT: I am terribly troubled at this time.

MR. KATZBERG: May I show you Page 74 of Mr. DeGenaro's Grand Jury appearance on July 23rd, 1975? These are the questions for the record and the answers that were elicited.

"Answer: May I point out something? I could have asserted, if I wished, the attorney-client privilege with respect to these documents, but elected not to do so, and my client elected not to do so in the interest of trying to provide whatever information we have available."

MR. BANNIGAN: The problem is --

MR. KATZBERG: May I continue, please?

MR. BANNIGAN: Sure.

MR. KATZBERG: Now, I make the following representations to the Court. While Mr. DeGenaro didn't speak to any of the clients, Mr. MacDonald had Mr. Shea do so and after Mr. MacDonald and Mr. Shea had their conversation, Mr. Shea got back to Mr. -- to Judge MacDonald and told Judge MacDonald that the client waived.

THE COURT: Yes.

MR. KATZBERG: After Mr. Shea told Mr. MacDonald that the client waived, Judge MacDonald told Mr. DeGenaro he could therefore go into the Grand Jury and produce the documents.

MR. BANNIGAN: I guess you have Mr. Shea here.

THE COURT: The only way I can get to the root of the answer to that question, I must first read that question to him. They don't like that.

MR. COHN: They didn't read you the whole testimony. That's what -- let me read the next question.

"Question: With whom did you discuss the assertio of the attorney-client privilege?

"Answer: Judge MacDonald. He is not --

"Question: He is not the client?

"Answer: No. The client is the bank and what is left of the bank is a very small number of persons because the bank assets were sold.

"Question: Whom at the bank did you discuss the applicability of the attorney-client privilege?

"Answer: I don't know that I discussed it with anybody at the bank."

MR. KATZBERG: I'm not saying he did.

MR. COHN:

"Question: Anybody from the Shea firm discuss it with anybody at the bank?

"Answer: Shea and I discussed it ourselves and I discussed it with Judge MacDonald. And it was decided not to assert the privilege.

"Question: Was any officer, employee or anyone connected with the bank consulted on this matter?

"Answer: No."

THE COURT: Let me tell you something that is wrong with that. Shea says they decided not to assert the privilege. Shea is in a dual capacity. He's a partner but the other capacity is that as a

director of the bank and he could speak for the bank.

MR. BANNIGAN: Not if he has an adverse, your Honor, he can't.

MR. KATZBERG: I think Judge MacDonald can take the stand and testify.

THE COURT: I won't put Judge MacDonald on the stand. I'd disqualify myself. I wouldn't do that.

MR. KATZBERG: The point is this --

THE COURT: I have personal reasons for not doing that.

MR. KATZBERG: Even Mr. DeGenaro didn't speak -- I'm saying that even though Mr. DeGenaro didn't speak to the client, Mr. Shea told Mr. MacDonald that he in fact did speak to the client and the client waived. That's why DeGenaro went into the Grand Jury and produced the documents. There is not dispute about that.

MR. BANNIGAN: There certainly is a dispute about that on behalf of the client. If you want to do this you have to have Shea on the stand.

THECOURT: DeGenaro can testify to what Shea told him.

THE COURT: All right. I have enough from Mr. DeGenaro for today. I have enough from him.

MR. KATZBERG: May I add to the record one more thing?

THE COURT: I wasnt to ask him one question here and whatever his answer may be, that will be enough for me to ask Mr. Shea. In the meantime, I want briefs filed on Monday.

MR. KATZBERG: I want to make one more statement for the record.

THE COURT: It's not as easy as you think it is.

MR. PATTISON: No.

MR. BANNIGAN: That's why I raised it, your Honor. That's why I raised it before that document went into evidence.

THE COURT: They know I recognize it as a serious matter.

MR. BANNIGAN: Before the document went into evidence.

MR. KATZBERG: Mr. MacDonald told me prior to Mr. DeGenaro coming into the Grand Jury that the matter had been discussed with the client and the client waived. That was before Mr. DeGenaro

MR. BANNIGAN: Hearsay.

MR. KATZBERG: Shea told MacDonald. If you can ask for -- Judge MacDonald to make that statement, what he knows about it?

MR. PATTISON: Statement possibly not --

MR. KATZBERG: Not a question and answer, just what his information. Because he's the one who has the information.

MR. COHN: Mr. Shea will be here Monday?

THE COURT: Yes.

MR. COHN: I think we ought to make a representation --

THE COURT: You fellows understand? I don't think it is fair to myself, Miles MacDonald in this position as -- the man is a very, very fine, excellent high class man and I have respected him for 20 years and I wouldn't do that to him. I respect the man.

MR. COHN: Let me make a representation --

MR. RYAN: It's not irrelevant.

MR. COHN: We attempted to serve a subpoena on Mr. Shea. Mr. Shea is in Florida. Mr. MacDonald called Mr. Ryan yesterday and said that he'll be back Monday and he'll appear on Monday morning.

testified.

THE COURT: Mr. MacDonald would say the very same thing today because he's a very honorable man. I've sat with him for 15 years and I know the man better than anybody in the world.

MR. BANNIGAN: We have to wait for Mr. Shea.

THE COURT: I think we should, too. I'll ask him the last question.

MR. COHN: That's why I told your Honor he'll be here Monday.

MR. BANNIGAN: I'll withdraw the question. I'll wait for Monday.

THE COURT: Yes.

(In open court)

THE COURT: Mr. DeGenaro, I'm going to ask you one more question and then the hearing will probably be suspended for today and we'll go on Monday morning.

THE WITNESS: Yes, sir.

THE COURT: The question I'm going to ask you is this. It's on Page 74 of the Grand Jury minutes and it reads as follows:

"Question: All of the various documents that you have produced here for us this morning contains

Exhibits 130 through Exhibit 139, are they the completed response to the subpoena in Exhibit 129?

"Answer: Let me answer that by saying the subpoena was served on me and I had a search made of office files. All of the office files relating to this matter or matters that may be relevant and they are -- were submitted to me. I went through the files and I produced what I think was relevant under the subpoena and fairly responsive to the subpoena.

"Question: All right. Thank you, sir.

"Answer: May I point out something? I could have asserted, if I wished, the attorney-client privilege with respect to these documents, but elected not to do so, and my client elected not to do so, in the interest of trying to provide whatever information we have available.

"Question: With whom did you discuss the assertion of the attorney-client privilege?

"Answer: Judge MacDonald. He is not --

"Question: He is not the client?

"Answer: No. The client is the bank and what is left of the bank is a very small number of persons because the bank assets were sold.

"Question: Whom at the bank did you discuss the applicability of the attorney-client privilege?

"Answer: I don't know that I discussed it with anybody at the bank.

"Question: Anybody from the Shea firm discuss it with anybody at the bank?

"Answer: Shea and I discussed it ourselves and I discussed it with Judge MacDonald. And it was decided not to assert the privilege.

"Question: Was any officer, employee or anyone connected with the bank consulted on this matter?

"Answer: No."

All right. You made those answers?

THE WITNESS: I made those answers to the Grand Jury.

THE COURT: To those questions?

THE WITNESS: Yes, sir.

THE COURT: Now, you yourself did not speak to Mr. Shea about whethere he consulted anyone at the bank or whether he was talking in reference --

THE WITNESS: I did not.

THE COURT: -- in reference to the bank?

THE WITNESS: I did not ask him whether he

consulted anyone at the bank.

THE COURT: All right. We will suspend the hearing at this point until Monday morning at 10:00 o'clock and then Mr. Shea will be presented to the court.

MR. KATZBERG: Thank you, your Honor.

THE COURT: All right.

You may step down.

MR. MAC DONALD: Mr. Shea is out of town. He's not been served with a subpoena. Will your Honor direct that he appear on Monday rather than without -- without a subpoena and then I'll tell him.

THE COURT: Yes. Monday morning 10:00 o'clock.

MR. RYAN: I have agreed to that with Judge MacDonald. He can appear here Monday.

MR. MAC DONALD: I want to know the Court has directed him to appear. He hasn't gotten a subpoena.

MR. RYAN: I mailed it.

THE COURT: I direct that he appear Monday morning.

MR. RYAN: Thank you, Judge.

lam3[1]

WILLIAM A. SHEA, called as a witness, being duly sworn by the Clerk of the Court, testified as follows:

MR. RYAN: Is your Honor going to conduct the investigation as you did with the witness DeGenaro?

THE COURT: Yes.

Now, Mr. Shea, I assume that you have been advised as to the reason for your being called to the witness stand at this time outside of the presence of the jury.

THE WITNESS: Yes sir.

THE COURT: All right. And there has been invoked by the bank in this case, one of the defendants, a privilege claiming that they -- the privilege continuing in that an attorney representing the bank as yourself or Mr. DeGenaro has no right to testify on the basis that they have not waived. That is what we are trying to find out.

Okay. The Court has elicited from the previous witness, Mr. DeGenaro, that you had a conversation in your office together with Judge McDonald and Mr. DeGenaro and yourself? Is that a fact?

THE WITNESS: Yes sir.

THE COURT: And that prior to appearing before the grand jury, that you discussed your appearances

before the grand jury and as to whether or not you would be representing the bank? Did you have any discussions of that type?

THE WITNESS: Not as to representing the bank.

THE COURT: Not as to representing the bank. All right.

Well, this conversation that you had between the three of you, were there any times during that period that there was conversation as to whether or not there would be a waiver and a production of documents on behalf of the bank before the grand jury?

THE WITNESS: I don't recall any of that.

THE COURT: As of the time that you appeared before the grand jury, did you in fact fail to assert any waiver or privilege in reference to the bank?

THE WITNESS: I didn't assert any.

THE COURT: You didn't. What did you say? Do you recall?

THE WITNESS: Nothing was said.

THE COURT: Nothing was said.

Do you know that Mr. DeGenaro, when he appeared before the grand jury, stated that in the conference with yourself and Judge McDonald and he, that it was specifically agreed that you would waive, that you

would not assert the attorney-client privilege before the grand jury.

THE WITNESS: That we did.

THE COURT: That you did. All right.

Now, was that assertion between yourself or agreement, was that made on the basis that one of you were representing the bank before this grand jury?

THE WITNESS: No.

THE COURT: Did any of you -- either you or Mr. DeGenaro appear at the grand jury as a representative of the bank?

THE WITNESS: Not that I know of.

THE COURT: Did you at any time discuss with the bank your attorney-client relationship in appearing before the grand jury?

THE WITNESS: I can't answer that. Attorney client came up -- as far as I was concerned, I was testifying personally from the subpoena I got.

THE COURT: All right. At the time that you appeared before the grand jury, were you advised as to what position you were in in your appearance?

THE WITNESS: Yes.

THE COURT: And will you place on the record what that advice was?

THE WITNESS: He advised me that anything I

said would be held against me; that the testimony for the -- before the grand jury was such that I could be a defendant; and also that I was a potential defendant in the proceedings.

THE COURT: In other words, you were advised that you might be a target of the investigation.

THE WITNESS: I could be, yes.

THE COURT: All right. Now, at that point -- withdrawn.

In the conversations that you had between yourself and Judge McDonald and Mr. DeGenaro, did the resulting fact of not asserting the privilege in reference to the bank come about by reason of the fact that you thought you might be a target of the investigation?

THE WITNESS: I don't know whether that was really the conclusion. I thought that both DeGenaro and I by being called before the grand jury could be put in that position.

THE COURT: I see. Now, did you prior to going to the grand jury and after this conversation in your office between the three of you, speak with any of the bank representatives in reference to your appearance before the grand jury?

THE WITNESS: Before I went over?

THE COURT: Yes.

THE WITNESS: I don't think I spoke to anyone. I could have spoken to Pat Clifford, telling him that I got a subpoena to go over. I don't think I spoke to anyone else. But I may have spoken to him.

THE COURT: In that conversation with Mr. Clifford, was there any discussion about waiving the privilege of attorney-client?

THE WITNESS: No.

THE COURT: Did you at any time -- and now I want you to reflect -- did you at any time discuss with anyone representing the bank or the board the waiver of attorney-client privilege?

THE WITNESS: No.

THE COURT: Now at the time that you appeared before the grand jury, were you a member of the board? Security National Bank.

THE WITNESS: I was.

THE COURT: What position did you hold with the board?

THE WITNESS: That's all.

THE COURT: Just a member?

THE WITNESS: Just a member of the board.

THE COURT: Just a member of the board.

Were you also the attorney for the bank?

THE WITNESS: We were counsel to the bank, but not in this proceeding.

THE COURT: No, no. I'm talking about house counsel to the bank.

THE WITNESS: Yes.

THE COURT: You were house counsel to the bank?

THE WITNESS: Yes.

THE COURT: Now, is the -- when you appeared before the grand jury, did you appear at any time as house counsel to the bank?

THE WITNESS: No, I didn't.

THE COURT: Was there anything that you said before the grand jury that was said in reference to any statement made by the bank to you or conversations?

THE WITNESS: Well, your Honor, I go through a lot of conversations. I can't say that I -- I can't really answer that to know which may have pertained to the bank. It mainly involved myself. And I was one of the ones that asked -- insisted to the district attorney before the subpoena that I wanted to be called. So it wasn't a question of me just getting a subpoena.

THE COURT: All right. Now, when you discussed the --

THE WITNESS: As before this court.

THE COURT: That is, the question of contributions with the bank and the methods, were you discussing it with them as an attorney or were you discussing it with them as a member of the bank?

THE WITNESS: From the standpoint of any conversations I had with anybody in reference to contributions, they would have to be from my position as an attorney at the time.

THE COURT: As an attorney at the time.

THE WITNESS: There were very few conversations that I had with anybody in reference to contributions, if any.

THE COURT: But when you did in fact become involved in the contributions themselves --

THE WITNESS: Well --

THE COURT: As far as exchanging a check --

THE WITNESS: Yes.

THE COURT: Were you doing that --

THE WITNESS: But that wasn't --

THE COURT: I must ask the question because I have to make a determination eventually.

THE WITNESS: Surely.

THE COURT: Were you doing that as a representative on the board or were you doing it as an attorney?

THE WITNESS: I did it as an individual.

THE COURT: As an individual?

THE WITNESS: Yes. Nothing to do with the bank. Nothing to do with it.

THE COURT: In any event, in the transfer of the funds or the discussion of the funds, you were discussing it with individuals of the bank, not as an attorney at the time --

THE WITNESS: Those particular times you're talking about, yes.

THE COURT: All right, I have no other questions.

MR. RYAN: May I ask a few?

THE COURT: I don't think you better ask. Tell me what you would like.

MR. KORMAN: With all due respect, I don't believe that Mr. Shea's characterization any more than Mr. DeGenaro's characterization of what capacity they --

THE COURT: I understand.

MR. KORMAN: -- is at all relevant.

THE COURT No, that is not the --

MR. BANNIGAN: Only for the same issue.

THE COURT: That is not the reason.

MR. KORMAN: We are talking about their opinion.

MR. RYAN: Would you like me to confer with the Court and --

THE COURT: I understand your objection, but that is not the reason for the question.

(The following took place at the side bar.)

MR. RYAN: Your Honor, I would like to develop the relationship between Mr. Shea and the bank. Not only was he a director, but he served on several committees and was active in the management affairs of the bank.

THE COURT: I think the question I asked covered that.

MR. RYAN: It bears on the question as to whether he was appearing as a member of the Security National Bank and not as an attorney. He may be concerned about his own role as a member and his participation --

THE COURT: Of course. That's why I asked him the questions.

MR. RYAN: I think it can be --

MR. PATTISON: I don't think it's of any further amplification.

THE COURT: Because he himself says he was acting as his lawyer and at times acting as an individual.

MR. RYAN: At the time he was an attorney and he wasn't appearing as an attorney. He was testifying about activities as an individual agent of the bank.

THE COURT: I understand. Do you want me to ask him that one?

MR. RYAN: Yes.

MR. PATTISON: May I also --

THE COURT: He said he was the target of the investigation.

MR. PATTISON; One other area that might be brought out is that he was aware of the fact that the bank and its officers were aware of the grand jury processes served upon many of its officers prior to his appearance.

THE COURT: Yes.

MR. PATTISON: And was any assertion made on the part of the board or anyone else?

THE COURT: All right.

MR. BANNIGAN: Ask him whether there was a

waiver. That's the issue. There has to be an affirmative waiver.

MR. PATTISON: There does not.

MR. BANNIGAN: If somebody is saying -- that is not the law.

THE COURT: It's a little different.

MR. BANNIGAN: Look, I --

THE COURT: I personally think Judge McDonald should have heard this conversation up here because he represents the witness.

MR. RYAN: I'm sorry. It's perfectly all right with us. I don't mean to exclude him.

THE COURT: All right.

(End of side bar.)

MP (continued next page)

(The following took place in open court.)

THE COURT: One or two more questions to see whether or not I can interpose their questions at this time.

First of all, at the time you appeared before the grand jury, were you appearing as an individual or were you appearing as a representative of the bank?

THE WITNESS: As an individual.

Q The testimony that you gave to the grand jury, was that testimony as an individual?

THE WITNESS: I gave it asan individual.

THE COURT: Did you also know at the time that you represented the bank, and you appeared before the grand jury, that many other officers had likewise appeared before the grand jury?

THE WITNESS: Yes.

THE COURT: Have you had any conversation with those officers in reference to a waiver of a privilege of attorney-client relationship?

THE WITNESS: No.

THE COURT: Did any of the witnesses that appeared before the grand jury, those whom you know, ever discuss with you the waiver of the bank's attorney-client privilege?

THE WITNESS: No.

THE COURT: All right.

MR. BANNIGAN: I have one question I would like to a : Mr. Shea.

THE COURT: Come up.

(The following took place at side bar.)

MR. BANNIGAN: I would ask you to ask the witness, your Honor, in the course of his grand jury appearance, did he disclose conversations that he had with the bank in his capacity as an attorney. That is in issue --

THE COURT: But there is a waiver of any one of them --

MR. BANNIGAN: There wasn't --

THE COURT: I'll see if there is.

MR. PATTISON: The failure to assert it upon proper notice may be deemed a waiver. That is the Government's positinn here. Clearly this is what occurred --

THE COURT: I'll ask the question differently.

(The following took place in open court.)

THE COURT: One further question, at the time that you appeared before the grand jury, did you disclose everything that you knew about -- whether it was as an individual or attorney before the grand jury -- everything you received by way of conversation,

consultation or otherwise?

THE WITNESS: I think they were very thorough. I can't recall anything I didn't testify to.

MR. BANNIGAN: Whether the witness disclosed in the grand jury information that he learned in his capacity as attorney --

THE COURT: He said he disclosed everything.

THE WITNESS: I disclosed everything.

MR. BANNIGAN: Including information --

THE COURT: Whether as an attorney or as an individual; is that so?

THE WITNESS: Yes.

MR. KORMAN: I wonder if I can put a couple of questions to the witness?

THE COURT: No.

MR. KORMAN: It's so difficult to go through this because sometimes one question follows another.

THE COURT: No, I will stick to the method I am using. You may tell me.

(The following took place at side bar.)

MR. KORMAN: First, I would like to know who represented Mr. Shea at the time of his grand jury appearance. Secondly, I knowthe answer to that is Myles McDonald, I would like you to ask who was

counsel to the bank, which the answer is he was, third, I would like the question to be put who was representing the Security National Bank throughout thegrand jury investigation for the purpose of the investigation and there may be questions --

MR. BANNIGAN: I have no objection to those.

(The following took place inopen court.)

THE COURT: You probably heard the questions.

THE WITNESS: I didn't.

THE COURT: The first question, who was representing you at the time you appeared before the grand jury?

THE WITNESS: Judge McDonald.

THE COURT: Who was representing the bank at thetime you appeared before the grand jury?

THE WITNESS: Where?

THE COURT: At any time when you --

THE WITNESS: Our firm was representing the bank generally.

THE COURT: Was it the entire firm or any specific individuals in the law firm who had specific duties with the bank?

THE WITNESS: Any number of them would have had some particular field involved.

MR. KORMAN: I meant with respect to this

investigation.

THE COURT: I am sorry, I thought that was understood. Withrespect to this investigation, who was representing the bank at the time this litigation was taking place and appearances were had before the grand jury?

THE WITNESS: Any number of them, including Judge McDonald.

THE COURT: Were you at any time representing the bank personally as a member of the firm?

THE WITNESS: No, not in connection with this.

THE COURT: All right. Any more questions? Come ahead and tell me side bar.

(The following took place at side bar.)

MR. KORMAN: Isn't it a fact that as counsel for the bank he or his firm arranged for certain bank officers or employees to obtain separate counsel? If so, at whose direction?

MR. BANNIGAN: I ask the relevancy of that?

MR. KORMAN: It shows the extent which they were involved in --

MR. BANNIGAN: The question is: Was a waiver obtained. All this is peripheral.

MR. KORMAN: We believe a bank counsel is capable of acting for the bank and --

MR. BANNIGAN: Counsel cannot waive without the authorizatio of a client.

MR. KORMAN: I think that is a separate ruling.

THE COURT: If that is so, I wouldn't be doing this.

(The following took place in open court.)

THE COURT: If it is as simple as you make it, I wouldn't be doing this, Mr. Bannigan.

The next question has been -- read the question.

(At this time, the reporter read the proposed question by Mr. Korman to the witness.)

THE COURT: Is that a fact?

THE WITNESS: We did -- somebody from the firm did.

THE COURT: Did you make any arrangements?

THE WITNESS: I didn't. I know other people were doing it.

THE COURT: These were persons of the bank themselves for which you were making arrangements -- other officers -- for the purpose of this investigation?

THE WITNESS: Yes.

THE COURT: If so, at whose direction?

THE WITNESS:- I don't know whose direction.

THE COURT: Was it at any time at your directio

THE WITNESS: No, I didn't make any of the recommendations. They came from others in the firm.

THE COURT: All right.

MR. KORMAN: One more, when these attorneys were retained, I think Judge Meyers' firm for Mr. Chadwick, who paid the legal fees for them?

MR. BANNIGAN: Objection as totally irrelevant.

MR. KORMAN: No --

THE COURT: It goes to authority.

THE WITNESS: The Chemical Bank paid.

THE COURT: All right. You may step down.

Now, all of you have heard the testimony of both witnesses, Mr. DeGenaro and Mr. Shea. I am going to ask each one of you to make a short statement or brief summary of what your position is inreference to the waiver.

MR. BANNIGAN: Before that, I ask a statement be put on the record on the side which bears on the question --

THE COURT: On the side?

MR. BANNIGAN: Over here (indicating).

(The following took place at side bar.)

MR. PATTISON: Prior to this, let me say, for your sake, I know the reason coming over here is apparently to assure none of this appears in the press.

(Time noted 3:05 P.M.)

(The following occurred out of the hearing of the Jury.)

THE COURT: The following memorandum is being read into the record.

(Reading into the record.)

THE COURT: Security National Bank seeks to prevent Mr. Shea and Mr. DeGennaro from testifying as to matters which the bank claims are covered by the attorney-client privilege. After holding a plenary hearing, this Court comes to the conclusion that the communications sought to be introduced are not privileged. It is settled law that communications from a client to any attorney made in furtherance of fraud or the crime charged are not privileged. United States v. Bob, 106 F.2d 37, 40, (2d Circuit 1939) cert denied., 60 S. Ct. 115 (1939.) United States v. Bob involved an analogous fact pattern to the case at bar. See United States v. Friedman, 445 F.2d 1076 (9th Cir. 1971); cert denied, 404 U.S. 958 (1971).

Since this Court finds that a prima facie case of conspiracy to violate the election laws has been proven, the Court concludes that the communications in question were not privileged. See Supreme Court

standard 503 (d)(1) in Weinstein on Evidence which reads:

"(d) Exceptions-there is no privilege under this rule:

(1) Furtherance of crime or fraud. - if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud."

Nothing elicited by the Court in the plenary hearing would lead it to depart from the conclusion that the challenged testimony is admissible.

MR. BANNIGAN: We take exception and move for a mistrial and a severance.

THE COURT: Denied.

MR. NAFTALIS: I join in that application and renew my application on Mr. Clifford's behalf for a severance.

THE COURT: Denied.

MR. KATZBERG: I ask that a one-page letter from Mr. Thorneburg, the Assistant Attorney General of the Criminal Division be marked as a court exhibit.

I have already shown this letter to Mr. Naftalis. It's in response to one of the motions he

MR. BANNIGAN: I would just like to state: If you recall yesterday there was an exhibit marked for identification, which after certain inquiry, turned out to be an exhibit that Mr. Katzberg had prepared and your Honor sustained our objection to that exhibit going into evidence.

At this time, your Honor, I do not want to argue it. However, I make a motion for a mistrial on the grounds that the Government created an exhibit in this case which they should not have created.

THE COURT: You mean the list of names?

MR. BANNIGAN: Yes.

THE COURT: It is not an exhibit. I did not let it go into evidence.

MR. BANNIGAN: On the basis that they sought to offer into evidence an exhibit, which they created, I say is improper --

THE COURT: A mistrial has to be something that will prejudice the jury or influence the jury under such circumstances that the defendants could not get a fair trial. I have not come to that conclusion at all. No one saw it but us.

MR. BANNIGAN: Then let me modify the motion: I move to dismiss the indictment on the grounds that the Government improperly tried to get into evidence

an exhibit which they created.

MR. PATTISON: I just want the record to show that we did that also with the charts.

MR. KATZBERG: I want the record also to be clear that the list of names was the list taken off the names that appeared on the Long Island Public Affairs memo of March 27, 1970, and that it had the exact same names and was based upon information already in the record.

MR. BANNIGAN: Let me respond to that; That was an exhibit that the Government sought to keep out of evidence. I submit that this list of names was prepared some time ago in the hopes that the other exhibit, the Dutra memorandum, would never go into evidence and this would be used in lieu thereof by the Government.

THE COURT: Why are you smiling?

MR. COHN: I have a newspaper article that appeared in Newsday. I would like to have it offered into evidence and I would like you to permit me to read to the jury the last paragraph in the newspaper clipping.

MR. PATTISON: Only the last paragraph.

(Document shown to Court.)

THE COURT: For the record I will say this: I

dds/ss

laml

(The following occurred at 11:05 o'clock a.m. in the absence of the jury.)

MR. KATZBERG: Good morning, your Honor.

It is the Government's understanding that Mr. Bannigan is going to call on behalf of the bank a man named Holloran. And that Mr. Holloran will be testifying as a tax expert --

THE COURT: A tax expert?

MR. KATZBERG: Yes sir. As to the tax consequences of the salary raises from an Internal Revenue Service criteria point of view as to whose money the raises really were.

And the Government has some serious doubts as to the admissibility of this testimony, and would at this time ask Mr. Bannigan for an offer of proof.

THE COURT: Yes, make your offer of proof.

MR. BANNIGAN: First of all I will hand up a memorandum of law that I prepared on the subject, with a copy to the Government.

THE COURT: Why didn't you give me this about an hour ago.

MR. BANNIGAN: The Government advised me this morning that they were going to oppose this testimony.

THE COURT: You had this this morning, Mr. Bannigan, and I don't know why you just didn't

hand it to me in Court and say, Your Honor, will you please look at this in chambers while you are sitting in there, even if you are drinking a cup of coffee, or anything at all.

MR. KATZBERG: Your Honor, I will state for the record I wasn't advised this man was to testify until 5:30 yesterday afternoon.

MR. BANNIGAN: Which was a courtesy.

MR. PATTISON: And even then, your Honor, we only were told his name and not what he would say.

THE COURT: All right, I will hear you.

MR. BANNIGAN: Your Honor, the witness, Mr. Holloran, a former Internal Revenue Service agent, and a man who has had a long association with the Internal Revenue Service, will testify as an expert witness on the following subject matter:

He will testify based on a hypothetical question based exclusively on the facts in this case that the moneys given to these officers were taxable to them because it was their money.

Conversely he will testify that if the money was the property of the bank as contended by the Government in this case on a conduit theory, it would not be taxable for them, it would not be their money.

Now, the Government sees this in issue since they went into it on direct examination of Mr. Powell in asking questions directly on this issue.

THE COURT: I am going to ask one question.

MR. BANNIGAN: Certainly your Honor.

THE COURT: Now, with respect to this witness, are you telling me that this expert witness is going to substitute his judgment for the jury's judgment as to whether the moneys were salaries and then taxable, or whether the money belonged to the bank.

MR. BANNIGAN: He is going to testify that it was their money.

THE COURT: An expert witness cannot testify except in the situation of a medical type case or some other particular type of case where the doctor gives a diagnosis --

MR. BANNIGAN: Your Honor, this is an issue --

THE COURT: -- and then he can say I find that the fracture healed or it did not heal.

MR. BANNIGAN: I respectfully disagree with your Honor. I think the new rules of evidence encourage the use of expert testimony --

THE COURT: Yes, including where there is a

question for the expert, but the expert is not allowed to take the question of fact away from the jury --

MR. BANNIGAN: It is not taking --

THE COURT: -- it has not been changed.

MR. BANNIGAN: I submit he can, your Honor, under the new rules. He can give testimony on the ultimate issue in the case -- we are not asking the witness to testify on the ultimate issue in the case -- but he is testifying on an issue which bears on the ultimate issue.

THE COURT: He is testifying on the direct issue as to whether or not the salaries that these men received were bank money or it was theirs because it was taxable to them --

MR. BANNIGAN: That is not the ultimate -- there is more to it than the fact that they paid the taxes on it. The question here is whether it is their money or the bank's money.

There are facts in evidence --

MR. PATTISON: From an IRS point of view.

MR. BANNIGAN: -- elicited both by the Government and the defense that these were permanent salary raises. There is testimony in this case that some officers --

THE COURT: How can an expert from the IRS or anyone else tell the jury that I think that it is the money of the men.

MR. BANNIGAN: That is what any expert will testify to, your Honor. Any expert testifies in an opinion that something is so.

THE COURT: I do not believe that he is allowed to do that. But I want to look at that memorandum of yours.

MR. BANNIGAN: There is an additional reason.

THE COURT: What is the additional reason?

I do not think an expert can do that with the jury. You can't take the question of facts away from the jury except --

MR. BANNIGAN: He is not taking it away from the jury. He is giving an opinion. It is up to the jury as to whether they want to accept it.

(Continued next page.)

(The following continued to be heard in the absence of the jury):

THE COURT: You are confusing an opinion with a question of fact.

MR. BANNIGAN: I respectfully disagree with your Honor. All experts when they testify --

THE COURT: That is why you are arguing, because you disagree. If you didn't disagree, you would not be arguing.

MR. BANNIGAN: That is correct, your Honor.

I simply submit that whenever any expert testifies, he testifies and gives an opinion on a factual issue in a case. It is up to the jury to decide whether they accept or reject that witness' testimony. But the ultimate fact is still for the jury to find beyond a reasonable doubt.

THE COURT: There are two types of expert opinions that may be given. There is the expert opinion that can be given as to the condition that he finds at the time. That is the first type. There is a second type of expert opinion that says that if a thing is constructed in such a way that the construction might not have been in accordance with the standards -- but whether or not it was improperly constructed is for the jury --

MR. BANNIGAN: I am not saying, your Honor --

THE COURT: You are saying --

MR. BANNIGAN: There is evidence in this record, your Honor, that certain officers used this money for other purposes other than the purpose for which they were given. They therefore had dominion and control over these funds. They exercised that dominion and control. However, no person was ever penalized in any way when he stopped making contributions, a fortiori that is their money.

THE COURT: Let me ask you a question now that will only get down to the nitty-gritty of it.

When a man receives a raise from anyone -- forgetting this case -- anyone -- does this employer say to the employee, I am giving you a raise of $5,000, of which $1,000 is for taxes? Now, are you telling me an expert has a right to come into this court and tell this jury that that is the way it is done? It is not so.

MR. BANNIGAN: This witness has a right to testify that in his expert opinion the monies that these people received under the hypothetical that will be given to him based exclusively on the testimony in this court was their money for tax purposes and not the bank's money, which is the Government's contention.

It is the Government's contention in this case that these people were mere conduits and a mere conduit does not have to pay any taxes on the money.

THE COURT: The Government's contention in this case is conduit, scheme, or a design, in order to avoid a contribution statute. That is their position.

MR. BANNIGAN: May I make one point clear, your Honor, there is no statute that is foolproof in every way.

THE COURT: Of course not.

MR. BANNIGAN: And if there is a loophole found in the statute there is nothing wrong with using that loophole.

I suggest, your Honor, if you exclude this witness testimony you are preventing the bank from putting in a viable and a perfectly proper defense in this case.

THE COURT: That may be so from where you are standing --

MR. PATTISON: Your Honor, may I just add one point --

THE COURT: -- but that is not the Court's position at this point.

MR. PATTISON: First of all, your Honor, I would like some time to read this memo, which I haven't even

seen.

Number two, I think over and above what the Court has in fact said, I think the relevancy is a critical issue here. I feel that whatever the tax consequences were has nothing to do with whether the plan was legal or not. In other words, a bribe -- when a person gets a bribe he must pay income taxes on that, and the fact that there is a crime involved has nothing to do with the tax function. And I think that if this man is called, the expert in tax consequences, which I believe is the field which he is offered in, it has nothing to do with the issues here.

THE COURT: What section do you have?

MR. PATTISON: Of course it was taxable income to them. And that is why they got the extra $500.

MR. KATZBERG: It is not even an item in dispute.

MR. RYAN: 704 of the Federal Rules of Evidence --

MR. BANNIGAN: It is in the memo.

THE COURT: I have 702 and 704.

I will not disagree with the rule that is promulgated under the Rules of Evidence. But I am just telling you that there are two types of experts. One can draw a conclusion for the jury and the other one cannot, very simply put. Unfortunately, you are asking

for the type of expert who is not allowed to draw a conclusion for the jury. That is what you are saying.

MR. BANNIGAN: I think in my opinion, your Honor, it is supported clearly by the rules. And he is allowed to draw an opinion, and in a proper charge by the Court, which I am sure the Court will give, the jury is advised they can accept or reject that because the issue is up to them.

THE COURT: Absolutely. But that is only where the jury has a right to hear an expert's opinion and say that a conclusion can be drawn therefrom. This is not what you are talking about?

MR. BANNIGAN: I think it is, your Honor. The central issue in this case is whose money it is. If the witnesses that in his view it is the money of the officers, then that undercuts the Government's contention.

Now, there is one other point I want to raise, your Honor.

THE COURT: Let me read your memorandum --

MR. BANNIGAN: There is one other point which I would like your Honor to bear in mind, and which is not in the memo.

THE COURT: What is that?

MR. BANNIGAN: And it is that the Government

1 THE COURT: The court, in addition, to what has already been put on the record by the Court in its opinion as to whether or not to permit the former IRS agent to testify, the expert, the Court includes the following:

The attorney for the bank has made an offer of proof with respect to the testimony of Mr. William Holloran. Mr. Holloran will testify, if allowed, as to the tax consequences of the salary raises. The tax consequences of the salary raises are irrelevant to the issues before the jury in this case. Accordingly, the witness will not be permitted to testify.

MR. BANNIGAN: May I be heard on one point? May I first take an exception?

THE COURT: Your exception is noted.

MR. BANNIGAN: The witness' testimony, your Honor, in the context of the tax consequences is obviously that the money is either theirs or is the corporation's.

THE COURT: That is a question of fact for the jury and irrelevant at this time.

MR. BANNIGAN: I take exception, your Honor.

May I tell Mr. Holloran that he is excused?

THE COURT: Yes.

MR. KATZBERG: The Government will start its case

THE COURT: The court, in addition, to what has already been put on the record by the Court in its opinion as to whether or not to permit the former IRS agent to testify, the expert, the Court includes the following:

The attorney for the bank has made an offer of proof with respect to the testimony of Mr. William Holloran. Mr. Holloran will testify, if allowed, as to the tax consequences of the salary raises. The tax consequences of the salary raises are irrelevant to the issues before the jury in this case. Accordingly, the witness will not be permitted to testify.

MR. BANNIGAN: May I be heard on one point? May I first take an exception?

THE COURT: Your exception is noted.

MR. BANNIGAN: The witness' testimony, your Honor, in the context of the tax consequences is obviously that the money is either theirs or is the corporation's.

THE COURT: That is a question of fact for the jury and irrelevant at this time.

MR. BANNIGAN: I take exception, your Honor.

May I tell Mr. Holloran that he is excused?

THE COURT: Yes.

MR. KATZBERG: The Government will start its case

MR. KATZBURG: Thank you, your Honor.

Judge Costantino, Tom Pattison, Mr. Ryan, Mr. Cohn, Mr. Naftalis, Mr. Bannigan, ladies and gentlemen:

We have been in this courtroom for almost ten weeks now because of the events which took place at the Security National Bank between 1967 and 1974, when the defendant Patrick Clifford, and the defendant David Dowd, decided to implement a new contributions program at the bank for the purpose of increasing the bank's share of the lucrative multi-million dollar municipal accounts; when they decided that the surest way of getting these lucrative accounts was to increase the amount of money that the bank would contribute to the politicians in the area who controlled those accounts and whose influences were to be used to obtain those accounts.

Mr. Clifford and Mr. Dowd, as we heard, took charge of this program and they brought in Frank Powell, who was brought in for the specific purpose of watching the money that was going to be raised; and knowing that it was illegal for the bank to make political contributions, but wanting to make them anyway.

These defendants devised a rather cynical

way to hide the fact that the bank was really making the contributions. And they did by forming a club. The bank's money would be given to the members of the so-called club in the form of special salary increases. The club members would in turn take that money and give it back to Mr. Powell's secretary, Betty Jaeger. And she in turn would take that bank money, now disguised as club money, and put it into her special account. And that bank money in its disguise as club money would be funnelled to the politicians chosen by Mr. Clifford and Mr. Dowd and Mr. Powell. And having chosen to mask the true nature of what they were doing by setting this so-called club, the defendants chose about twenty of their more senior officers in late 1967 and made them the members of this so-called club.

Mr. Dowd and Mr. Powell were designated to be the -- recruiting these individuals into the club at that time. And during this trial, we have heard from a good many of the original twenty some odd members of this club who were recruited in late '67 and early '68 when the defendants instigated their scheme to evade the law.

We heard from Mr. Hart, Mr. Bradley, Mr. Vandermark and Mr. Brooks, that they were reached

3 individually, approached by their boss, David Dowd.

We have heard from Mr. Fretz, Mr. Sly, Mr. Lamberton, Mr. Dickerson and Mr. Knoess, that each of them was individually approached by his boss, Frank Powell.

And we heard from James Brogan, that he was approached by his boss, Patrick Clifford, in the presence of David Dowd.

And each of these officers on that witness stand told you what these defendants told them. And not surprisingly, ladies and gentlemen, these officers were told pretty much the same thing, that the bank wanted to get these lucrative accounts; that in order to do so, it wanted to make these political contributions; that since banks could not make political contributions, senior management -- obviously, the three defendants -- had selected an officer as a key officer of the management team to make these contributions on behalf of the bank. And each of these men was told that if he agreed to participate, he would receive this special $1700 raise, having nothing whatsoever to do with merit, being given to him only if he agreed to join for the sole purpose of compensating him -- of giving him the money to make the contributions of a hundred dollars a month, and to pay

for any tax increase which would result from the salary increase.

And each of these men, as they told you on that witness stand, was told by one of these defendants that this was a confidential arrangement not to be discussed around the bank.

Now, as we have learned, it was the bank's policy that the board of directors of the bank have to approve all salary increases recommended by management. The management of the bank, the people who actually ran the bank on a day-to-day basis, would recommend that Officer A would get a certain increase. And, as we learned, the standard policy was to write up that increase on an officer's salary review form, with the officer's name, how much he should be getting, the recommended salary increase, and why he was getting that increase.

Thereafter, those forms would go to the board of directors. And in 1967 and 1968, Mr. Moss and Mr. Clifford would make the pitch to the board based on those forms as to which officer should get what raise.

From 1969 to 1974, Mr. Clifford and Mr. Powell would make the presentation to the board as to which officers should get which raises. Those discussions

and the decision that the board came to about those raises would be reported in the minutes of the board.

But, ladies and gentlemen, these defendants did not want anything in writing to reflect the fact that salary increases were being given to officers to make political contributions. So they intently avoided the regular standard bank procedure and did not write up those $1700 contribution increases on the officer's salary review forms. And they did not submit for board consideration those seventeen-hundred dollar increases, did not ask the board to pass upon or approve any of those seventeen-hundred dollar salary increases.

And so the defendants in late '67 and early '68 by intentionally bypassing the normal bank procedure gave approximately twenty different officers seventeen hundred dollars each, and there is not one word in writing, either in the minutes of the board of director or the officers' salary review forms, which reflect anything about those raises.

Now, a little later on in the summation, we will detial more specifically how each and every raise that was given to one of the contributing officers was given without board knowledge or approval. But it is sufficed to say that none of the seventeen-hundred dollar

6 raises were ever that the Board was never asked to pass upon or approve any of them.

How, ladies and gentlemen, those raises, however, are recorded on those green vesy cards, the personnel records that each officer has. And through the testimony of the officers and their identifying, as you recall, each of their contribution raises, we know that those raises were given and those raises were used. And each of the men who testified on that witness stand for the Government told you what these defendants told them about the raises, that these raises were given to them only for the purpose of making the contributions. So there is no question that the raises were given. The officers received them. And that the only purpose of the raise was the contribution. That is not in dispute here.

And as these officers testified, and as the cancelled checks that they identified when they testified show, it was only after they got the raise that they started to make the contributions. And thus, there is no question that the money they turned back to Mrs. Jaeger was the money they got in the form of a raise to make a contribution.

So there is no question that the hundred dollars a month they turned back to Mrs. Jaeger was in fact

disguised bank money.

Mrs. Jaeger was a witness at this trial, you may recall. And she told you that she was approached in October 1967 when the scheme was just getting underway by her own boss, Frank Powell. And she told you what Mr. Powell told her, that she would be expected to collect a hundred dollars a month from a group of officers who would be making contributions on behalf of the bank. He wanted her to open up a special account, and keep the records of the account, and collect the money.

Mrs. Jaeger told us that Mr. Powell at that time gave her a list of about twenty names from whom she should expect to receive these contributions.

Mrs. Jaeger opened the account as per Mr. Powell's request. The signature card is in evidence, Exhibit 60. The monthly statements for that account are also in evidence, Exhibit 61. And they are in evidence for you to examine and see for yourself.

So there is no question that the special account was opened; that it functioned from October 1967 through December of 1970. No question about that either.

And Mrs. Jaeger further told you that it was Mr. Dowd who would usually tell her who to draw the

checks to on that account. And sometimes Mr. Powell would give her that information. And the cancelled checks that Mrs. Jaeger wrote pursuant to those instructions on that Betty Jaeger Special Account are in evidence as Exhibit 62 for you to see and to examine yourself.

And as Mr. Casey testified and as Mr. Dutra testified, Mr. Clifford, Mr. Powell and Mr. Dowd were the ones who decided which politician got what money.

This fact was confirmed by a Government witness by the name of James Lamberton. You might recall that Mr. Lamberton testified that he and Frank Powell shared an office in Huntington; and that he could not help but overheard Mr. Clifford, Mr. Dowd and Mr. Powell discussing which politicians should get what money.

You will recall Mr. Lamberton's testimony to that effect.

And so from 1968, 1969 and into 1970, this illegal scheme continued. And new officers during this period of time were added to the original twenty. And each time a new officer came into the contributions system, as Mrs. Jaeger testified, Mr. Powell would give her that officer's name, tell her to add that officer to her list, and expect a hundred dollars a month from him. And each of these officers were brought into

9 the club in '68, 69 and '70, with the exception of 4859
Mr. Clifford and Mr. Dutra, who were given $1700 salary increases to pay them to make the contributions.

And, ladies and gentlemen, the board of directors was never given a chance to approve or disapprove any of those salary increases either.

Now, let's step back for a moment and let's analyze this Betty Jaeger Fund from a common sense point of view, and let's ask ourselves three questions about it.

First, whose system was this?

Second, whose money was this?

And third, what was the purpose of the whole thing?

Now, as to whose system this was, obviously, it was Mr. Clifford, Mr. Dowd and Mr. Powell.

Secondly, it wasn't Mrs. Jaeger's, even though they used her name on the account. Mrs. Jaeger was given her duties by Mr. Powell, and those duties were that of a conduit and a clerk, keep the records, collect the money, put your name on the account, and write the checks as we tell you.

So even though they used her name, it obviously wasn't her system.

Well, then, what about the officers? What about

the so-called club members? Was it theirs?

No way.

Many of them felt that they had but very little choice to participate. As Mr. Vandermark told you on page 900 of the record, quote:

How do you say, no, when a superior comes and tells you you are one of the group that will be selected to do something?

End of quote.

And you might recall the testimony of Bradley in that regard when he told you that he told Dave Dowd, "I don't like it. But if I have to, I will join."

So, obviously, these men didn't exactly knock on Mr. Clifford's door in an urge to make contributions.

(Continued next page)

And so each officer who was in this thing knew that he was responsible to turn back a hundred dollars a month. An amount that he did not choose, and an amount that he was told to contribute. And, importantly, ladies and gentlemen, each and every officer who took that stand told you that he had no idea where the money went after he gave it to Mrs. Jaeger. He had no idea at all.

He wrote the check to her. He gave her the cash. What happened after that was none of his business. He never found out. He was never told.

So whose system was it? The system belonged to the men who conceived it. The men who set it up in the first place. The men who chose the officers. The men who chose Mrs. Jaeger. The men who decided where the money would go. The men who spoke to the officers to get them involved. The men who decided that the contributions would be a hundred dollars a month. And the men who watched the money. Mr. Clifford, Mr. Powell and Mr. Dowd.

They created the system. They called all of the shots. And they made all of the important decisions. It was their system.

All right. The second question is, assuming that it was Mr. Clifford, Mr. Dowd and Mr. Powell, whose

money was it?

During the course of this trial, defense counsel has tried very hard to convince you that -- to have you believe that this money really belonged to the officers; that this money was given to the officers to spend as the officers saw fit.

Ladies and gentlemen, I submit to you that is nonsense. Each and every one of these officers involved during this period of time, except for Mr. Clifford and Mr. Dutra, was given a special $1700 raise specifically for the contributions, having nothing to do with merit, being given to him only to make the contributions and for no other reason. And, significantly, these raises were given to these men only after they agreed to make the contributions.

You will recall Mr. Vandermark told us that at page 823 of the transcript.

"I was told that if I agreed to participate, I would get the contribution raise."

Mr. Dowd admits that. The defendants admit that. That this money was only given to the officers once they agreed to pay back a hundred dollars a month. And because the officer only got the money after he agreed to contribute and because the raise was only given to him to make the contributions, the officer

knew that he had to turn back a hundred dollars a month. That was his obligation.

You might recall I asked Mrs. Jaeger, what would happen if an officer didn't give you a hundred dollars a month?

If an officer failed to make a payment one month, what would happen?

And you might remember that she said, she would tell that man that that money was owing.

But that didn't happen very much.

Of course, it didn't happen very much. These men knew why they got the money and what they had to do with it once they got it. Because the money wasn't theirs.

Even Mr. Dowd admits that the defendants -- that the officers had a "moral commitment," to turn the money back either to Mrs. Jaeger and later on to Arthur Chadwick.

Of course, they did. That was the only reason why they got it.

That's why, for example, you might remember Mr. Vandermark and Mr. Maass each opened separate savings accounts for the money. And you might recall that the savings books from those savings accounts were put in evidence.

4 As Mr. Vandermark said on page 43 as to why he opened up the savings account, "I maintained the savings account so I wouldn't get the money mixed up with my own."

Obviously, Mr. Vandermark didn't think it was his money. Of course, it wasn't their money. It was money given to them by the bank to give back.

All that these participating so-called contributing officers really contributed was the use of their names and the use of their checking accounts. Because these contributions, as they all testified, didn't cost them a dime. And even their checking accounts as bank officers -- even their checking accounts were free. So these men contributed absolutely zero. All they gave was the use of their names and the use of their checking accounts and nothing more.

Now, the fact that this money -- that the money that was used for these contributions was really bank money becomes even more obvious when we look at the reaction of some of these men when the money was offered to them.

You might remember the very first witness in this trial was a man named Jack Fretz and the third witness in the trial was a man by the name of William Sly. And each of those men was brought into

5 the club by Mr. Powell. And you might remember what they said, Mr. Fretz and Mr. Sly, that after Mr. Powell approached them and said, "If you contribute, you will get $1700." They each had to think it over before accepting the raise. They each wanted time to think it over before they took the money. And the same was true with Ralph Groskopf, who was also a witness for the Government in this case. He had to think it over before he accepted the raise.

Ladies and gentlemen, when was the last time you had to think it over before you accepted a raise that your boss gave you?

"I am sorry, boss. I am making so much money already, I can't spend it fast enough. Please don't give me any more money. Let me think it over before I accept the raise."

When was the last time that happened in your own experience?

Obviously, these men had to think it over because they had reservations about getting involved. And obviously, they had to think it over before they accepted the money because they knew it wasn't going into their pockets. They knew it wasn't given to them as they saw fit. It was given to them for their simple, limited purpose to give back, to be spent not

6 as they saw fit, to be spent as Mr. Powell Mr. Clifford and Mr. Dowd saw fit.

So that's why they had to think it over before they accepted the money.

So whose money was it? Obviously, it was the bank's money.

The third question we should ask ourselves about this Betty Jaeger system here is, what was it all about? What was it for?

Look at all that was involved here. Starting the thing. Opening the account. Enlisting the officers. Getting the raises approved without telling the board. Collecting a hundred dollars each month from twenty different people month after month after month, keeping all the records, balancing the account, sending out the checks under a secretary's name. Why go through all that? Why not just write bank checks to the politicians? Certainly, it would have been a lot easier, wouldn't it? It would save a lot of time. Look at all the man hours that were involved in these manipulations. Why go through all that?

The answer is appearance. They did what they did because it looked better that way. Gave the appearance of individual contributions and not bank contributions.

7 And why was it so important to hide the fact that it was really -- what was really going on was a bank making contributions. Because it's against the law for a bank to make contributions directly or indirectly. And these defendants knew that. And so, it was necessary to go through all the gyrations with the account, in collecting the money and keeping the records, to hide, to mask, to disguise, to cover up what was really going on. And that's what this conspiracy operation is all about.

And then you will recall that sometime in the spring of 1970 it was decided that the Betty Jaeger Fund, as round-about and as deceptive as it was, was still a little too obvious. And so Mr. Clifford, Mr. Dowd and Mr. Powell and Joseph Dutra decided that a change was needed, a cosmetic change intended to make things better, to make things look better.

As Mr. Casey testified on page 1296 about a conversation he had with Mr. Dutra after this change was decided upon by the defendants and Mr. Dutra -- the change to the Long Island Public Affairs Club.

"Mr. Dutra told me that the existing system of making political contributions was not deemed well-appearing enough because it was a co-mingled funds and it was from a special account. And so it was

determined a cosmetic change was needed, that a public affairs club had to be created which would then make the contributions.

"Question: Was anything said about whose decision this wasy?

"Answer: He," meaning Mr. Dutra, "told me this was the decision of the same gentleman, Messrs. Clifford, Powell and Dowd, and he had discussed that with them."

Now, the defendants want you to believe that it's not true that this change from the Betty Jaeger Fund to the Long Island Public Affairs Club was really a cosmetic change intended merely to make things better. But, ladies and gentlemen, have they offered any explanation for this change?

No.

Mr. Dowd admits that the only thing that was changed was the name.

But why change the name? What was the purpose of that?

I submit to you, the only logical and intelligent explanation was that offered by Mr. Casey. This was a cosmetic change intended to make things look better.

Again, appearances are most important, not what

is really going on. How things look.

And to make things look better, they chose a high-sounding name, a high-purpose and non-bank-related name, the Long Island Public Affairs Club. And that would be the vehicle for these political contributions.

And so in the spring of 1970, they opened the account. And they began to funnel the money to the politicians -- the bank's money to the politicians through that account. Everything else remained the same.

The bank money was given to the officer. The officer would give the bank money back to Mrs. Jaeger. She would now deposit it in the Long Island Public Affairs Account as per the instructions of the same people, and she write the checks, this time on the Long Island Public Affairs Club account. And this account, this Long Island Public Affairs Club, lasted about five months, until about September of 1970. And the cancelled checks and the monthly statements of the Long Island Public Affairs Club are in evidence as Exhibits 63 and 64 for you to look at and examine yourselves.

And, as we heard from the officers who testified, not a single one of the old Betty Jaeger Fund members was even told that he was now a member of the

9a Long Island Public Affairs Club, not one, not one of those officers, those twenty some odd men, was even told that the money he was turning back to Mrs. Jaeger was being deposited into the Long Island Public Affairs Club.

(Continued next page)

You might recall that it wasn't until I showed these men the endorsement on the back of those checks written to Betty Jager and they saw that the endorsement said, deposit, Betty Jager, IPAC, that it wasn't until I showed them that endorsement that they learned that the money that they were turning back to Mrs. Jager was being deposited into the Long Island Public Affairs Club. Because they were never told by anybody before that. Of course not. It wasn't their money. Why should they be told?

It wasn't their business. Why should they be told?

Now, what kind of club was this Long Island Public Affairs Club? What kind of a club is a club whose members do not even know that it exist?

Did you ever hear of such a club before, where the members of the club don't even know that the club exist?

What kind of club is a club whose members don't even know they belong to the club? Did you ever hear of that kind of club before?

What kind of club is a club whose members are funelling money into the club, money which isn't even theirs and they don't even know that they are funelling the money into the club?

What kind of club is that?

Did you ever hear of such a thing before? I mean what kind of club is that?

That's not a club, ladies and gentlemen. That's a sham. That's a farce. That's a slush fund. That is a system for the laundering of the bank's money. That's what that is.

Now, you may recall in his opening statement to you Mr. Naftalis, Mr. Clifford's lawyer, told you at the very start of this trial that you would not see any evidence of any slush fund or the laundering of any money.

I submit to you that the evidence in this case clearly shows that these accounts and these manipulations were just that. Slush funds used to launder the bank's money.

Under the Betty Jager and Long Island Public Affairs Club system, the bank's money was laundered in four steps. Four cycles.

Cycle 1: The bank's money is taken and is poured into the individual checking account of 27 selected officers.

In cycle 2, that money is rinsed through the checking account of those officers. And after being

rinsed through those checking accounts, it is returned to Mrs. Jager in the form of checks on those accounts.

In Cycle 3, Mrs. Jager takes that money, that same money once again, and deposits it into either the Betty Jager account or the Long Island Public Affairs Club account, which once again washes the money, turning it into so-called club money.

In Cycle 4 of this laundering operation, the money is funneled to the politicians and political committees chosen by the defendants in its final disguise form as checks drawn on either the Betty Jager or the Long Island Public Affairs Club accounts.

And when they changed to the Arthur Chadwick system, all they did was to eliminate the bank account, the second rinse cycle. That's all that was changed.

The use of these accounts and the flow of this money from the bank to its officers, back to it's secretary into an account, and then into the politicians -- if that isn't the laundering of bank money, then what is?

And since this is so obviously a slush fund, since this is so obviously a laundering operation, is it possible, is it conceivable that the people who created this system, who supervised it and ran it,

that these people, the defendants, didn't know that this is what it was?

We are not dealing here with any naive or unsophisticated men, ladies and gentlemen; how could they not have known that this which was so obviously a slush fund -- how could these men not know that?

As the judge will charge you, the law in this area prohibits both direct and indirect contributions of bank money. And isn't this the system we have been talking about the most perfect example of an indirect contribution of bank money, from the bank to the officers, to Jager, to the politicans. Obviously, that's what it is.

And how did these defendants not have known that?

Now, you may recall that just before the Long Island Public Affairs Club came into existence in the Spring of 1970, Mr. Powell reviewed the records of the Jager account and found that there simply wasn't enough money there to make all the contributions they wanted to make. And so two things were done. As we heard, the first thing that was done was to borrow $15,000 from May 8, 1970 from William Shea, and use that money as the opening -- the seed money, so to

speak, for the Long Island Public Affairs account. And that check, which is drawn payable to Mrs. Jager, is in evidence as Government's Exhibit number 65.

I will have a lot more to say about Mr. Shea later on.

Suffice it to say now, that one of the two ways these defendants used to cure their cash flow problem was to borrow $15,000 from Shea. Two other ways they chose in 1970 was to expand the club and to bring in more participants.

And the testimony as to that we heard from Mr. Brogan, who told us about that decision being made by -- in his discussions -- Mr. Clifford, Mr. Doud and Mr. Powell. And we also heard from Mr. Casey to the same effect, that in 1970 it was decided, after Mr. Powell reviewed the records, that there wasn't enough money, and new people would have to be brought into the contributions organization, and with more participants, more money would be generated. And they could meet the commitments that they wanted to make.

And as you will recall, in June of 1070, Mr. Doud and Mr. Dutra went to Martin Travers. And they went to Mr. Travers in order to obtain information on

some of the potential members for this expanded contributions organization.

And as Mr. Travers told you, page 1222, "They," meaning Mr. Dowd and Mr. Dutra, "said that they were going to organize a new committee to raise additional funds and to find new sources for the funds." And they also said that they may have to increase the individual contributions from one hundred to two hundred a month. And they had a list with them at this time which contained the 27 names of the officers who were then contributing as members of the club. And they also had another list of maybe 20 officers of the bank who apparently hadn't been around the time the first club was organized. And they said that we feel we should be getting money from some of these people too.

"And they indicated that since I had hired most of these officers, which was correct, maybe I could suggest the best method as to how to approach these people and ask them for contributions."

Continuing on 1223:

"Question: They wanted you to tell them how they should be approached; is that correct, sir?

"Answer: That's right.

"Question: What, if anything, did you say to that?

"Answer: Mr. Travers said, 'I told them, I didn't feel that that was my problem.' I said, you know, 'I am not a contributor myself. And it would be very difficult for me to go to these other people and ask them to contribute.'

"In addition to that, when I heard these people, I had said nothing about having to make contributions or anything like that.

"And so Mr. Dowd, well, you don't have to worry about that.

"And I believe he used the expression, they won't be out of pocket because we will reimburse them or increase their salary to the extent that it will take care of the contributions which they make."

And in late 1970 a number of new officers were brought into the club.

Mr. Brogan told us that at Mr. Clifford's direction he introduced Mr. Hadley and Mr. Maass in December of 1970 by speaking to Robert Vandermark, their boss.

Mr. Vandermark told us the same thing.

Mr. Brogan also told us that at Mr. Clifford's

direction he informed Mr. Bradley about his club membership in 1970. Mr. Casey told us that Mr. Dowd introduced him into the club in December of 1970. And Mr. Gargano told us that Mr. Dowd introduced him into this club in December of 1970.

George Maass told us that in December of 1970 Mr. Wulffleff told him that Patrick Clifford had specifically chosen him to be in this expanded club.

And Mr. Merolla -- Carmine Merolla told us that in December of 1970 Mr. Wulffleff told him that Mr. Clifford had specifically chosen Mr. Merolla to be in this expanded club.

Robert Doud told us that in December of 1970, Frank Powell told him about his participation as a contributor.

Just as David Dowd promised Martin Travers -- those officers who were added to the system in late 1970 to this expanded club -- they were given salary increases to pay for the contributions as well.

And as you will recall, Mr. Brogan told us that Mr. Powell and Mr. Clifford decided at this time that some of the officers should get two thousand and not seventeen-hundred. And so, as the testimony of the officers who came into the organization at this time

tell us, and as their vesy cards, their gr en employment records show us, some of the men were added to the contributions system in late 1970 when it was being expanded to generate more cash. Some got two-thousand. Some got seventeen-hundred.

Casey and Merolla each got two thousand on January 4, 1971. And on the same day Gargano, Groskopf, Doud, each of them received seventeen-hundred. And so by early 1971 the system was expanded and there were over forty people making contributions of a hundred dollars a month.

And as we heard during the course of the trial, not only was the system expanded at this time, it also changed appearances once again. Because as we heard, the Long Island Public Affairs Club only lasted about five months. Because it became rather obvious to those people involved that the change to the Long Island Public Affairs Club had really accomplished nothing. All they did was to change the name. And that even though they had a fancy name to make these political contributions through that special account, it was too risky to have any name on any account. And so it was decided to eliminate the bank account and to funnel the bank's money to the politicians in a slightly

10

different way -- by having the contribution officers write checks on their own checking accounts each month directly to the politician selected by the defendants.

The participants would get a phone call each month from a contact officer -- first, Mr. Casey, then Mr. Chadwick -- and they would be told, "This month, write your check out to the XYZ political committee."

Mr. Chadwick would then collect all the checks and forward them to the politicians chosen by the defendants.

(Continued next page)

MR. KATZBERG: And so, for example, if the defendants wanted to contribute a thousand dollars to Angelo Roncallo's Congressional campaign ten different officers would each be called one month and be told "Write out your check to Citizens for Roncallo."

They would write out those ten individual checks for a hundred dollars each, forward them to Chadwick, Chadwick would collect them, write down in his book and forward those ten checks to the Roncallo Committee.

The Committee would receive ten different one hundred checks, which on the surface appeared to be the personal donations of ten different people, who all got the urge to make the same contribution the same amount to the same person at the same time.

When, of course, in reality those ten different checks represented nothing more than disguised bank money.

And so by this rather cynical scheme the defendants could launder the bank's money through the checking accounts of the 27 officers, and by 1971 forty some odd officers, and then funnel that money to the politician that they chose, without having any

of that traceable to a single account, the Betty Jaeger or the Long Island Public Affairs clubaccount.

And once again, like the previous changes, this was nothing more than a change for the sake of appearnce, to make things look better, to hide what was really going on, to better disguise the face that bank money was being used to make politicial contributions in violation of law.

Now, the elimination of a bank account, the Jaeger account and the Public Affairs Club account, required the contact officer, Mr. Chadwick, to keep rather detailed records.

Now, this he did, and those records, many of those records, are in evidence as exhibits number 84 through 121. They are Government exhibits.

These records of Mr. Chadwick's are available for your inspection, and so you can see for yourselves what money was brought in, by whom, when and where that money went. You can take these records into the jury room with you when you deliberate, and you can see exactly what happened here by looking at those records.

So pursuant to this new scheme Mr. Chadwick was moved to the Huntington office in September of 1970 so that his activities could be supervised by Mr. Dowd

and Mr. Dutra.

And Mr. Chadwick was told about his role by Mr. Dowd and Mr. Dutra, and they told Mr. Chadwick that these contributions werebeing made voluntarily out of the pockets, out of the own pocket of the officers contributing.

They didn't tell him anything at all about the raises.

And again, ladies and gentlemen, we should ask ourselves if these men felt that there was nothing wrong with these raises, why didn't they tell Chadwick about them, why did they have to tell Chadwick that the money was being contributed from the own funds of the officers? The answer is that Chadwick was not one of the select few in this thing.

Chadwick, while he worked directly under them, was not in the inner circle, and Chadwick was only told the information he needed to dohis job and nothing more.

The less that Chadwick knew about what was really going on, the better.

And so Chadwick carried out his function based on the information he was given, from September 1970 through 1974, and as the evidence has shown, and

as the evidence has shown, and as the Government exhibit number 181 in evidence, this chart, shows, year after year more and more money was generated, until 1973 it tapered off to about $40,000 and in '74 only goes through April of '74.

But as we can see from that chart, Exhibit 181, more and more money was generated as the years went on.

And as more money was generated by the bank the bank got what it wanted for its money, those municipal accounts. Because through the exhibits introduced by Winston Hart, as well as Defense Exhibits in this case, we can clearly see that as the contributions increased so did the municipal accounts, more money the next year, even more accounts.

So each year the contributions went up and each year the municipal accounts went up. And so the bank got what it wanted for its money, more money, more accounts.

And things were going right according to plan when an event took place in January of 1971 which threatened to expose these defendants and their system, and that was when Harry Melcher, an office at the bank, got fed up with participating in this

sham and decided that it better bet stopped, and that the only way he could go about stopping it was by writing an anonymous letter to the office of the Controller of the Currency, telling him what's going on and hoping that they put an end to it.

Now, Mr. Melcher's anonymous letter is in evidence as a Government exhibit. It's Exhibit number 171. You can bring this into the jury room with you and read it for yourself. I think you will find Mr. Melcher's anonymous letter most revealing.

In that letter Mr. Melcher told the Controller what was going on, that "Officers of the bank reaching a certain salary level were given a supplemental raise a couple of years ago, out of which they contributed fifty dollars per payday for twenty-four paydays. (One hundred dollars a month."

And he also reported the fact that postage stamps had been used to make political contributions. And we heard, when the Controller of the Currency got the anonymous letter, which we now know was written by Harry Melcher, he sent that letter to Edwin Langdon, a senior national bank examiner and told Langdon to investigate to see whether or not the charges in the anonymous letter were true.

Mr. Langdon was a witness at this trial and sat on that stand and told us what happened. Mr. Langdon told you that he called Mr. Clifford and told Mr. Clifford that he received this anonymous letter, that the Controller's office got this allegation that the Security National Bank was making illegal campaign contributions, and that he wanted to meet with Mr. Clifford to talk about it.

And so they arranged to meet on February the 19th, 1971 to discuss the contents of the anonymous letter. And when Mr. Langdon got to Mr. Clifford's office on February 19th, 1971, not surprisingly David Dowd was also there and Frank Powell was there.

Mr. Langdon showed them each a copy -- a xerox copy of the anonymous letter and they all read it. Mr. Langdon then confronted Mr. Clifford with the specific allegations and Mr. Clifford denied them.

Now, let's back up for a moment and let's examine this very crucial meeting right in the middle of this conspiracy.

Let's examine this meeting from a common sense point of view. Let's put ourselves in the defendant's shows for a moment and let's see what took place from their point of view.

You have just gotten a phone call from a senior national bank examiner who has told you that someone has disclosed to the authorities what you have been trying to keep a secret for years, that your bank was making illegal contributions.

You have to act quickly and you have to act decisively in order to keep things covered up, because you know that you're going to be confronted with accusations that, while true, you will have to make the authorities believe are not true.

So you have to deny them very carefully, but you have to deny them with force and with authority. So you decide that your denials have to be made in the presence of two other executives of the bank, men who Mr. Langdon will know have significant authority in the bank, so that when you issue your denials they will take an added believability because of the presence of two other senior people at the bank.

But you just can't include anybody in this meeting, can you? You just can't include anybody of stature from the bank to add credence to the lie that you're going to tell.

They also have to be people who are in on the scheme. They also have to be people who know how

crucial it is for you to stop this investigation at its start.

They also have to be people who have as much to lose as you do if this investigation is not halted.

In short, you can only rely upon co-conspirators because you have to be sure that when you issue your denials, that when you make your misstatements, that the other people present don't contridict you or don't blurt out the truth.

And so it is not any accident that when Mr. Langdon shows up to discuss the anonymous letter on February 19th, 1971, Mr. Powell is there and Mr. Dowd. And it is no accident that when Mr. Clifford issues his denials, tells Mr. Langdon the mistruths that he must tell it to him to keep this covered up, Mr. Powell and Mr. Dowd sit there and said nothing.

And by sitting there and saying nothing they add credence, they add believability to Mr. Clifford's denials.

Now, you will recall Mr. Langdon's testimony concerning that meeting. I realize that he testified a good number of weeks ago. You can have Mr. Langdon's testimony read back to you, or any other witness, for

that matter, but just to refresh your recollection, let me turn to Mr. Langdon's testimony about this crucial meeting now, beginning on page 2332.

"Question: Mr. Langdon, I want to focus on the meeting between yourself, Mr. Clifford, Mr. Dowd and Mr. Powell.

"Would you tell the ladies and gentlemen of the Jury as best as you can recall, what happened and what was said?

"Answer: Mr. Clifford and Mr. Powell and Mr. Dowd were shown the anonymous letter.

"Question: Did they read it, sir?

"Answer: Yes, sir.

"Question: Can you tell us what discussion took place after they read it?

"Answer: We went over each point in the anonymous letter, one by one."

You will recall the testimony of the defendants, Langdon didn't go over each point one by one. But Langdon says "We went over each point in the anonymous letter one by one."

And turning to page 2337, continuing the examination of Mr. Langdon, Exhibit 171, which, of course, is the anonymous letter:

"Question: Exhibit 171, the writer alleges, does he not, that officers at the bank received supplemental raises out of which they were to contribute a hundred dollars a month, political contributions; is that correct?

"Answer: Yes, sir.

"Question: Did you discuss that allegation with Mr. Clifford, Mr. Dowd and Mr. Powell?

"Answer: Yes, sir.

"Question: Could you tell us to the best of your recollection what you said and what, if anything, they said?

"By MR. LANGDON: We went over the allegations. I was told that officers of the bank did contribute but it was on a strictly voluntary basis, that no raises were given for the purpose of making political contributions."

Again, this is Langdon's testimony of the conversation, "That no raises were given for the purpose of making political contributions."

"Question: Who said that, sir?

"Answer: Mr. Clifford.

"Question: When Mr. Clifford said that, did Mr. Dowd say anything at that time?

"Answer: Not that I recall.

"Question: Did Mr. Powell say anything at that time?

"Answer: No, sir."

Now, let's put this meeting in another perspective, ladies and gentlemen, let's set aside for a moment what was actually said as we just read from Mr. Langdon's testimony, but let's focus for a second on what these men knew to be true on February 19th, 1971.

Let's start with Mr. Clifford's statement, "No raises were given for the purpose of making political contributions."

As of the day he made that statement, February 19th, 1971, Mr. Clifford had already introduced Mr. Brogan into the club and promised him a raise specifically for the contributions.

(Continued on the next page.)

About a month before the Langdon meeting Mr. Clifford specifically approved the hiring of Albert Fach at a $35,000 salary, $2,000 for the contributions. Less than one month before the Langdon meeting.

Mr. Fach, who wasa witness at this trial, you may recall, and he talked about the negotations of the salary, they offered him thirty, he wanted thirty-three, Mr. Brogan told you that he had no authority, he went back to Clifford, Clifford said to -- Clifford said offer him thirty-five, but two thousand for the club.

And if we look at Mr. Fach's busy card, Exhibit 17, that green card for Albert Fach, it shows that he got that money, two thousand dollars for the club, from the total of thirty-five, just eighteen days before the Langdon meeting.

Did Mr. Clifford forget?

Moreover Mr. Clifford admitted to you that he was fully aware of the salary raises right from the start of the contributions in 1967. He knew about all of those raises. And Mr. Dowd told you that he reported which people agreed to contribute and who received raises to Mr. Clifford after he introduced

them.

So Mr. Clifford obviously knew full well about the salary raises on February 19th, 1971, when he told Mr. Langdon that no raises were given to make contributions.

Did he suddenly forget all of that? Did he have a lapse of memory? Did he suffer from amnesia? Or was he purposely and intentionally keeping that crucial fact away from Mr. Langdon?

What about David Dowd, what did he know about salary raises given for political contributions as of February 19th, 1971? Well, for openers he knew that he himself got just such a raise on 11/27/67, $1100 for political contributions. He certainly knew that.

Moreover we heard from a good number of the people that brought into the club promising each and every one of these men a raise for the contributions. Winston Hart, $1700, brought in by David Dowd, Robert Bradley $1700, promised by David Dowd. Robert Vandermark, $1700, promised by David Dowd, George Brooks, $1700, promised by David Dowd. Tom Casey, $2,000, promised by David Dowd. Michael Gargana, $1700, contributions raised, promised by David Dowd.

Mr. Dowd admitted offering those people those contribution raises and he admitted thathe was one of the ones who decided that the officers should get raises in the first place to make political contributions.

Did his memory suddenly fail him on February the 19th, 1971? Is that why David Dowd sat there and said nothing, and Pat Clifford told Ed Langdon that no raises were given for political contributions, did he have a lapse of memory?

What about Frank Powell, what did he know about contribution raises on February 19th, 1971? Well, obviously, he knew that he too got a contribution riases on 11/27/67 of $17000. He certainly forgot about that.

THE COURT: I think this time is a proper time to take a recess.

(Whereupon a recess was taken.)

H - 3

(After the recess.)

THE COURT: You may proceed, Mr. Katzberg.

MR. KATZBERG: So obviously Mr. Powell, just like Mr. Clifford and just like Mr. Dowd, knew all about the salary raises that were given to these officers on February 19th, 1971.

You heard from JackFretz, Bill Sly, Mr. Lambertson Mr. Dickerson, Mr. Knoess that they were all given salary raises by Mr. Powell.

It's interesting to note that the raise that Mr. Powell gave Robert Dowd occurred less than two months beffore the Langdon meeting, in which Mr. Clifford told Mr. Langdon that no raises were given for political contributions.

Less than two months before that Mr. Powell offered Robert Dowd a contribution increase of $1700.

Did Mr. Powell's memory fail him? Did he suddenly suffer from amnesia when the subject came up in front of Mr. Langdon? Is that why he said absolutely nothing and sat there silently when Pat Clifford denied that salary raises were being given to officers to make contributions?

Ladies and gentlemen, during the course of this trial we have heard a good deal about the

fine reputations that all of these men enjoyed during the years in question, and no doubt these men had fine reputations.

But there is also no doubt that these men used those reputations and abused those reputations, not only to get people into the club in the first place, but also to assure Ed Langdon that nothing that was claimed in the anonymous letter was true.

You see, because as far as Langdon was concerned he was dealing with three men who were trustworthy, credible and honorable. But what Ed Langdon did not know was that these three men would be able to and did trade their credibility, traded their trustworthiness and traded their honor to conceal the existence of the illegal system that they were responsible for.

Now, the defendants want you so much to believe that Mr. Langdon is either mistaken or lying when he tells you that Mr. Clifford specifically told him that no raises were given.

They want you to believe that this experienced, careful senior national bank examiner failed to discuss the very first specific allegation in the letter when he went there to investigate this matter.

And, of course, ladies and gentlemen, they

take this position for an obvious reason: Because if it is true, as I submit to you it is, that they lied to Langdon about these raises, that in and of itself shows full well that they knew that these raises were illegal.

And that they were engaged in an illegal scheme. Obviously, they would have no reason to lie to Langdon if they didn't know full well that those raises were illegal. So, of course, they denied that Langdon discussed the raises. "No, he meant reimbursement, I thought for sure he discussed the word reimbursement, not raises."

Ladies and gentlemen, read the anonymous letter for yourselves, just as the defendants did on February 19th. It doesn't say reimbursements, it says "Officers were given a supplemental raise."

Do you really think that Langdon is mistaken or lying about that? What axe does he have to grind in this matter? Read the anonymous letter for yourselves, listen to Langdon's testimony, the specific testimony that salary raises were discussed, and Mr. Clifford specifically denied that salary raises were given.

If these defendants honestly and truly believe that there was nothing wrong with those raises, that

their contribution system was open and legal and everything was fine with it, why did they have to lie about the raises? Why did Mr. Clifford have to deny the truth of what was going on? And why did Mr. Powell and Mr. Dowd add credence to those lies by sitting there and saying nothing?

And even if we assume for a second that the specific word salary increases were not used, if there was nothing wrong with this sytem and if these men had the opinion of counsel, that there was nothing wrong with their system, why did they have to split hairs over words, why did they have to hide behind defenses, "Well, you're saying reimbursement, ask me about salary raises and I will answer about that, but if you don't ask me I won't tell you?"

Why did they have to play these word games with Langdon if they honestly and truly felt that they had nothing to hide about these raises?

(Continued on the next page.)

Obviously, they played these words against him and they fenced with him over words, and they split hairs, were trying to do so. Because they knew that they had very much to hide and they didn't want Langdon to ask the right questions. Even if you don't believe he asked a specific right question, which I submit to you he obviously did, have Langdon's testimony read back and you will see what his testimony shows.

Read the anonymous letter. The charge is salary raise, not reimbursement.

Now, let's take a moment to focus on the second mistruth that was told that day to Mr. Langdon when he came to investigate. You recall that the anonymous letter said that postage stamps were used to make these contributions. And you will recall that Mr. Barrie, who was a Government witness, told you that in 1966, Pat Clifford came to him and said, "You know, Frank is not around. I want you to get 500 in stamps. Take them over to the campaign and say they are for me."

And George Barrie did that. And a few days later Pat Clifford called him up and said, "What did you do to me? I said $500 worth of stamps, not 500 stamps. Go back and get the rest of the money."

And so after having spent $25 of the bank's money,

he got another bank check for $475 and delivered the balance to the Leavitt campaign for their mailings for their campaign.

And Mr.Clifford admits that that happened. There is no denying that.

Mr.Barrie told you about it. And Mr. Clifford admits it. And Mr. Clifford also admitted under cross-examination that shortly after he ordered Barrie to do that, he realized that it was illegal.

Ladies and gentlemen, when Mr. Langdon asked him about the stamps, what does Mr. Clifford do? He denies, then, what he must admit now, that the stamps in fact were delivered and were used as a contribution.

Did he suddenly forget when Langdon asked him about it? Or did he remember it all too well?

When we think about how strongly Mr. Clifford reacted when Mr. Barrie didn't buy enough stamps and ordered him to go back and buy the rest of them, isn't it rather odd that Langdon brings up the question of the stamps? It doesn't strike that familiar chord with him.

Moreover, think about this: You recall that Mr. Barrie and Mr. Dowd both testified that shortly after Mr. Barrie came to the bank, they were summoned

to the office and asked about the letter. Do you remember that testimony about Barrie and Dowd? This is right after Langdon shows up at the bank, and then Mr. Clifford -- and Mr. Powell was there -- and Mr. Clifford says, "Who wrote this anonymous letter? What do you know about this allegation of stamps and about these salary increases?" Do you remember that?

Is it a coincidence that right after Langdon shows up, the one Mr. Clifford summons to see to question about the postage stamps is George Barrie, the very man who he ordered to get the postage stamps. Was that the coincidence? Did he make a lucky guess that day that George Barrie might know about the stamps? Did he thumb through the bank's directory and had his finger fall on George Barrie's name? Or did he remember all too well right after Langdon left who he directed to get the stamps and who might be the one who would know about something about how this allegation came to be made to the Controller.

Obviously, that was no lucky guess. Obviously, Pat Clifford knew full well that George Barrie was the man who knew about the stamps. And that's why he summoned him to his office right after Langdon shows up.

Pat Clifford knew full well about the stamps.

They were clear in his mind when Langdon asked about them.

Again, denies it. Denies it because he knew, as he admits, right after they were sent out, that that was illegal and that's why he denied it. No failure of recollection.

Now, you will also recall, with respect to this Langdon meeting, that Mr. Landon showed each of these men a copy of the letter and they read it. The anonymous letter. And that Mr. Powell recognized the handwriting of Harry Melsha and said, "You know, I think this is Harry Melsha's handwriting."

And Mr. Langdon says, "Please, don't take any reprisal against Mr. Melsha for writing this letter. Don't do anything to him. Just let it be."

And all three men, as you will recall, agreed, all right, no problem. We don't do anything to Melsha.

Now, throughout this trial the defense has tried to make so much of the fact that after they found Melsha out, they didn't fire him. They didn't cut his salary or they didn't demote him.

Of course not. They are not stupid. After telling Langdon that they wouldn't do anything to him, and if they fired him or demoted him, wouldn't that be

like waving a red flag in front of a bull?

If Harry Melsha could write an anonymous letter in order to stop this contributions system without any provocation by these men, God knows what he could do if they provoked him. And if the Controller found out that they took action against Melsha, wouldn't that be like admitting to the Controller that maybe there is something going on, despite Clifford's denials?

So, of course, they didn't take any action against Harry Melsha. It would have been insane to do that.

What Harry Melsha accomplished by writing that anonymous letter was to write himself an insurance policy against being fired. So long as Pat Clifford was at that that bank, and so long as that contribution slush fund was continuing, Harry Melsha had job security. Harry Melsha had job insurance. They could no more fire Harry Melsha after promising the Controller that they wouldn't do anything to him -- they could no more fire Harry Melsha under those circumstances than they could take away those salaries from the officers after this thing became public information.

Again, the defense has tried to make so much of the fact that these raises weren't taken away from these

people.

You see, that proves, ladies and gentlemen, that the -- the defense tells you that proves this was their own money because we didn't take it away from them.

What nonsense.

After admitting to Langdon in '71, after saying to Langdon, after lying to Langdon that there were no raises for contributions, how would it look if all of a sudden on the same day 40 some-odd different people each lose $1700?

Wouldn't that be like screaming to the world that those raises were indeed for the purpose of contributions?

Of course, they couldn't take those raises away. Because it would make it obvious what they were for in the first place. Somebody would be down to ask, how come 40 men lost $1700 in the same day.

So they could no more fire Harry Melsha than they could take away those salaries. Because, ladies and gentlemen, these are not naive men. These are not unsophisticated men. These are men who know what they are doing. These are men who have been around. And these are men, despite the defense attorneys' attempt to make something out of nothing, these men were too

smart and too sophisticated to make blunders like that.

So that's why the raises weren't taken away and that's why Melsha wasn't demoted or fired. Because these men were too smart to make such blunders.

Ladies and gentlemen, if these contributions were as voluntary as they want you to believe they were, why didn't they do this? Remember, Mr. Dowd said, "I made very sure that everybody had a free choice. Contribute or not, it's up to you. Nothing is going to happen. I wanted to make sure it was voluntary."

Once they read Melsha's letter, didn't all three of these defendants know full well that Harry Melsha wasn't too well excited about this thing and it wasn't as voluntary from Mr. Melsh's point of view?

If they wanted to make so sure that everybody contributing did so voluntarily, why didn't they call Melsha in and say, "Harry, listen. Apparently, you've got a problem with this thing. Forget about it. From now on you don't have to contribute because, obviously, you don't want to go along with this thing."

Did they do that? No.

Harry Melsha continued to contribute. Harry Melsha continued to pay the money back and even though they knew full well -- all three of these men had to

know by his letter that Melsha did not like this thing and wasn't going along voluntarily. So, even though they knew it was involuntary for Melsha, this letter screened it out to them. They didn't let Harry Melsha off the hook, did they?

He continued to contribute. 1971, 1972, 1973, 1974. They wanted the money. They didn't want the voluntary participation.

Now, it's very interesting, and I submit to you, it's very revealing to note how these defendants after they lied to Langdon in February of '71, used the fact that they fooled Langdon, and turned that into the fact that Langdon approves.

And as we discussed earlier, remember, that George Barrie and Robert Dowd are summoned to Clifford's office right after Langdon shows up. And they are cross-examined about this anonymous letter. Barrie, about the stamps, and Robert Dowd, about who wrote the letter. Even though they knew that Melsha wrote the letter. And then it's very interesting that Mr. Clifford says to Robert Dowd after this cross-examination takes place, he says, "By the way, the Controller's representative discussed this letter with us. And it's O.K. He found it acceptable."

Page 1598, Mr. Robert Dowd's testimony.

"He," meaning Mr. Clifford, "went on to tell me how he had discussed the matter with either Mr. Van Horn."

That's Charles Van Horn, Langdon's boss.

"He went on to tell me how he had discussed the matter with either Mr. Van Horn or somebody in Mr. Van Horn's office, and that the method we use for the club was acceptable to the Controller's Office."

They lied to Langdon. He's deceived. They take that deception and turn it into approval.

Beautiful.

(Continued on next page.)

MR. KATZBERG: (continued) The defendants are able to use Langdon's visit for their own advantage now. Based on Mr. Clifford's misrepresentation and denials, they turned lead into gold. They take the fact that they lied to Langdon and that he was fooled, and based on those false things, they say, Langdon and the controller approved. Very clever. Very clever indeed.

But, ladies and gentlemen, this is not the only example of how the defendants very cleverly are able to turn a liability into an asset, to turn something bad into something good.

Remember, when they met with Langdon they said, this is a totally voluntary system.

For example, Mr. Travers, he didn't want to participate. So he's not in. They turned Travers' refusal into an asset, when really it was nothing more than a liability, because Travers said, "I don't want to have anything to do with it.

"Listen, I don't want to have anything to do with it at all. It's your problem. I don't like it. I won't touch it."

That's an obvious sign, is it not, that somebody -- at least this thing isn't too good. Even after

this somebody was told that it was supposed to be legal. Travers has nothing to do with it.

What did they do? They take this obvious example that no lesser person than Travers thinks the thing is no good and they turn it into an example of how voluntary it is. That his refusal shows voluntariness rather than refusal, showing an obviously wrong that this system was.

No, ladies and gentlemen, these are not naive men. These are not unsophisticated men. They are quite skillful at turning things around, at shading things just a little, changing the emphasis and making something which is an obvious sign that something is very wrong into an example that things are terrific.

That is not to say, of course, that Mr. Clifford was not angry at Mr. Travers for not going along. Because when Mr. Dowd -- you recall Dowd said to Travers, "I'm going to report this to Pat."

When Travers said, "No," he said, "I'm going to have to report this to Pat and Pat isn't going to like it."

And Travers said, "Well, you know, do what you have to do."

Mr. Clifford, after finding out about Travers not participating, goes back to Travers and says,

"Marty, I've found out you're not going along with this thing. Idon't like it. I want you to know that and I want you to reconsider."

So just because they were able to use Travers as an example -- a bad example of somebody, that this thing being voluntary, that doesn't mean that they weren't too thrilled with Martin Travers for not going on. Clifford was obviously put out about that. And just because they were able to deceive Langdon in this meeting, that doesn't mean that they weren't worried about any further investigation from the controller's office, or the controller finding out any more information about what was going on. They were quite worried indeed.

That is why George Barrie and Robert Doud are summoned to Clifford's office.

Don't forget, they knew who wrote the letter. They know that Melsa wrote the letter. They knew it wasn't Doud. And it wasn't Doud or George Barrie. But they bring Doud and Barrie anyway and they cross-examine them about the letter.

Why? Because they wanted the word to go out that this kind of insubordination, this writing of an anonymous letter, telling the controller, telling the

authorities what is going on, that this kind of insubordination is not going to be countenanced; that they don't like it and they won't tolerate it.

That's why they bring Robert Doud down and that's why they bring George Barrie down. So the word goes out.

How else can we explain Mr. Powell telling Mr. Brogan, right at the time Langdon shows up, to eliminate any references on the personnel records to the contribution increases.

You recall Mr. Brogan's testimony about the asterisk, the little stars on those Visi cards, on the employment cards. You will recall that in early 1968 Mr. Powell spoke to Mr. Brogan and said to him thathe wanted him to place some discreet notations on the personnel records to show the $1700 contribution increase, to set them apart so that they would know which were the contribution increases. To use some discreet way of doing it.

And you will recall that after being told to do that, Mr. Brogan spoke to his secretary, Mrs. Donovan, and Mrs. Donovan put the asterisk on the Visi cards.

This is from Mr. Brogan, page 1011.

Brogan.

"Question: What did Mr. Powell say?"

This is January of 1968.

"Answer: He told me I should keep some discreet record in the personnel department, perhaps on the Visi records, regarding the individuals who received contribution increases.

"Question: Now, did Mr. Powell give you anything at that time?

"Answer: He gave me a list of the people who were receiving increases.

"Question: Approximately how many names areon the list?

"Answer: I think about 15 or 20."

And then you will recall that Mrs. Donovan, as per Mr. Brogan's instructions, put the typewritten asterisk to the right of the contributions increase, all of them being $1700. And after the asterisks were placed on there by Mrs. Donovan and Mr. Brogan's instructions, based on what Frank Powell told him, Mr. Brogan reported back to Frank Powell that it had been done.

Question on page 1014.

"Question: Did there come a time when you spoke to Mr. Powell subsequent to Mrs. Donovan placing

the asterisk on the record?

"Answer: Yes.

"Question: What if anything did you tell him?"

Answer by Mr. Brogan.

"Answer: I told him that the record had been noted as per his instructions and that we decided on placing an asterisk to the right of the increase on the Visi record."

Ed Langdon shows up. This is in 1968. And when Ed Langdon shows up in February of 1971 to investigate the allegations about the salary increases, right at that time Frank Powell goes to James Brogan and tells him to eliminate the references to the salary increases on the Visi cards.

Bottom of page 1015.

"He" meaning Mr. Powell -- "he instructed me to eliminate any reference on the records in the personnel department of the political contributions.

"Question: As a result of that, what if anything happened?

"Answer: The asterisks were erased.

"Question: Subsequent to those asterisks being erased, did you inform anyone of that fact?

"Answer: Yes, Mr. Powell, that it had been

accomplished."

So just to be on the safe side, just in case Ed Langdon decided to inspect some records, the asterisks were erased.

Now, the Visi cards which bear those erasures, which Mrs. Donovan identified that day, as you will recall, and I think those Visi cards were passed among you when you saw some of those erasures. Those are in evidence. And you might want to take a look at those erasures once again during your deliberations. Those erasures are silent but eloquent testimony that these defendants knew full well that they were engaged in an illegal activity; that those salary increases were illegal. And even this clandestine reference to this cryptic reference to little asterisks was too much and they dared not have it on their cards in case Langdon inspected them. Because they didn't want to be caught.

Because, ladies and gentlemen, you know full well that people who go around erasing records have something to hide. Otherwise, they don't engage in that kind of activity.

So not only did they lie to Langdon, not only did they deny the truth to him, not only did they fool him, but they covered their tracks to make sure they

would not get caught.

Now, as you heard --

Your Honor, this might be an appropriate time to break if you want to.

MR. NAFTALIS: I thought we were going to finish with the Government today.

THE COURT: I don't think it's appropriate.

They want to stay for a while.

Sure, go ahead.

MR. KATZBERG: Okay.

THE COURT: Go ahead.

MR. KATZBERG: As we heard, the Arthur Chadwick system continued through 1971, through 1972, through 1973 and into 1974. And you will recall that in October of 1972, in order to fulfill a promise made some months back to make a large contribution to the Nassau County Republic Committee, Mr. Chadwick and Joe Steven caused three bank checks to be issued.

Do you remember those three checks? Two for $2500 and one for $1000. The $1000 one went for Nixon, and one of the $2500 ones went for the Wachtler dinner -- the committee to elect Sol Wachtler.

And as Mr. Chadwick testified, Exhibit No. 133, the $2500 check, went to Wachtler, and 135, the thousand

dollar check, went to Nixon. The rally for -- the Nixon Rally. Those, of course, are in evidence for you to examine.

Now, Mr. Casey -- Thomas Casey confirms what Arthur Chadwick told us about those bank checks. First of all, that they were sent out in order to respond to an overdue contribution; that money had been promised and money had not been forthcoming. The event took place. The Nassau County Republicans still had not been paid the money that they were promised. And so those bank checks were issued.

You will recall that Mr. Clifford -- both Clifford and Casey testified almost exactly the same in this regard. Clifford received some complaint by a man named Sam Gerber at the Nassau County Republicans. This is Casey testifying that Clifford received the money.

Where was the money that was promised to the Nassau Republicans?

And he dispatches Tom Casey to find out about that late contribution.

Page 1369. This is Mr. Casey's testimony.

He -- meaning Mr. Clifford -- this was at a dinner at the Rainbow Room in the RCA Building, a political dinner.

"He" meaning Mr. Clifford, "told me that day he received a phone call from, I recall, Mr. Gerber, of the Nassau County Republican Committee, who asked him where the contribution was that had been promised to the Committee, and Mr. Clifford was upset by this because he did not like to receive this type of -- about receiving this phone call because it was in the nature of a dunning phone call and he asked me to check where the contribution was and I responded by telling him -- I reminded him that I was no longer playing that role in the contributions system and he said, 'What's the difference? I am asking you to check on it anyhow.'"

I'm sorry.

"I am asking you to check on it."

"So, I said I would."

"Question: The contribution had been promised sometime ago; is that correct?

"Answer: That is the impression that he was under and conveyed to me."

Then, of course, we learned that Mr. Casey, when he checked on this, was told that bank checks had gone on -- had been used to make these contributions.

(Continued on next page)

Chadwick told him that. And he reported that fact back to Mr. Clifford, that bank checks were used.

Page 1379, Mr. Casey again.

"Question: Now, you told us that you reported the conversation with Mr. Chadwick to Mr. Clifford, is that correct?

"Answer Yes.

"Question: Will you tell the ladies and gentlemen of the jury what you told Mr. Clifford?

"Answer: It was a few days later in Mr. Clifford's office in Melville, I went to see him and told him I had investigated the matter of the payment to the Nassau Republican Committee as he asked and that I had found the payment was made and it was made by official checks.

"And Mr. Clifford became angry and asked me who had approved it. I told him Mr. Chadwick told me Mr. Stefan had.

"Question: What if anything did he say to that, sir?

"Answer: 'You go tell Mr. Stefan to reverse it,' that is to reverse the payment of the official check.

"I" -- meaning Mr. Casey -- "told him that it

was too late for that, the checks had cleared, and he said, 'Well, I'm going to see that the bank is repaid.'

"'How are you going to do that,' I said, and he said, 'I'm going to have the fund pay back the money to the bank.'"

"'What is the good of that,' I said, 'when the bank has made it available to the participant now we are going to go full circle and have it back to the bank,' and he said he didn't care."

And as you recall, based upon Mr. Clifford's orders, the club members paid back the bank with the money they got from the bank, plus interest.

And, as you will recall, the records of the bank -- the bank's official records were altered, were reversed in order to change what that original entry was.

And you recall Robert Dowd, the man who was ordered to change the entry, told us that he changed the entry on instructions to make it look like a loan.

Page 1639.

'Question: Now, with respect to the revised entry, the entry you testified to was revised, will you tell us what kind of banking transaction was

reflected by the revised entry.

"Answer: By Robert Dowd.

"The revised entry was a repayment of the funds, treating it like a loan."

Now, ladies and gentlemen, the Government does not contend that the issuance of these three bank checks was part of this conspiracy that was hatched here, part of the usual system. Quite the opposite: This was a direct bank contribution. The system was a subterfuge to make indirect bank contributions. But what is very revealing, and why I am bringing this to your attention is not so much what was done with the checks themselves, but what was done after Mr. Clifford finds out that the checks went out. That is very revealing. Because it shows how everything that was done in this case was for appearances and was to make things look good, and that whatever the reality was, that that didn't matter.

Now, how was this matter handled? It was handled in two ways; first, they changed the records of the bank to make this contribution look like a loan; to hide the fact that a bank check went out to make a political contribution, they turned it into a loan.

Secondly, what they did was to have the club members repay the bank. Those are the two things.

The first question we should ask ourselves is, why change the bank records to make the thing look like a loan. Who applied for this loan? Did they fill out any loan application forms here? Was any collateral posted forthis loan? Who was the borrower of this loan? Who is the lender of this loan?

Nobody. This was a false entry intended once again to do nothing but to hide what really went on; to mask the truth, to cover it up. Because the true entry on the bank's books would have been bank checks sent as political contributions in error. That's what a real entry would have been.

But no, they put down a phony loan instead.

The second commonsense question we should ask ourselves about the handling of these bank checks is, if these monies were mistakenly sent as political contributions, which they were -- they weren't in the habit of being out in front with these contributions. Why didn't they go back to the Nassau County Republicans and say, "We made a mistake. We made a mistake. Could you give us our checks back."

They didn't even think of doing that, ladies and gentlemen, because taking that logical and obvious step simply wasn't in the scheme of this thing. It never entered Mr. Clifford's mind. Instead, Mr. Clifford said to Mr. Casey, "I am going to have the fund pay the money back to the bank."

Now, since the bank gave the money to the contributors to make the contributions in the first place, this bank was paying itself back. I mean, what sense did that make?

And when Mr. Casey confronted Mr. Clifford with the obvious ridiculousness of giving somebody money to pay you back for money that you laid out -- you're paying yourself back.

When Casey confronted Clifford with the obvious illogic of that situation, what does Clifford say? He says he did not care.

Now, once again, Pat Clifford is not a naive or unsophisticated man. He made his name in business deals a lot more sophisticated and complex and difficult than this one. That is for sure. And he must have realized full well that what he was doing here, having the bank pay itself back, made no sense at all, either logically or from a business point of view.

But as he told Tom Casey, he didn't care about such things. Just as with every other aspect of these contributions and these manipulations and these funds, what was done and all they cared about was how it looked. That's all that mattered. And entering a phony loan on the bank's books and having the bank pay itself its own money back as both the borrower and the lender of a loan which never took place, that's a small price indeed to make sure that things look all right.

And as we heard, ladies and gentlemen, contributions from 1973 into the spring of 1974, when articles were in the newspapers about the contribution systems at the banks and the grand jury investigation began.

Now, at this time, the spring of 1974, David Dowd was -- who was the president of the Nassau Trust Company and working for him at that time was Tom Casey. And you will recall Mr. Casey's testimony with respect to the date in early 1974 when he walked into Dave Dowd's office at the Nassau Trust Compan y, and David Dowd was on the phone. You recall that Mr. Casey told us that he stayed there for a while. Mr. Dowd finished the conversation. And then Mr. Dowd related

to Mr. Casey the conversation that he had just had.

Page 1388 of Mr. Casey's testimony. This is Mr. Casey.

"I walked in his office on other bank business and he was on the telephone.

"Question: Excuse me. When you say he --

"Answer: Mr. David Dowd.

"Question: Go ahead.

"Answer: And finishing up a conversation when he told me he had just been talking to P. J., who I understood to be Mr. Clifford. And he told me that Mr. Clifford was concerned about the investigation of Security National's political contributions.

"And Mr. Dowd said quote I hope those old records have been disposed of." End of quote.

"And Mr. Clifford said: 'Don't worry, that has been taken care of.'"

Then we heard from Mr. Chadwick that after he was subpoenaed some months later, he only produced his '74 records. Not his old records.

Ladies and gentlemen, most of Chadwick's old records nonetheless are here for you to examine and for you to look at. And you can see for yourselves how important these records are to this case.

Now, the defendants will no doubt argue, well, you know, they didn't say Chadwick's records. They must have been talking about something else.

Well, it's possible that they were talking about somebody's collection of old Russ Columbo's records or something else. But you can draw your own conclusions as to that and make your own intelligent reference and inferences from the records.

Take a look at those records. They are not old Russ Columbo's records. They are Chadwick's records. Exhibit 81, I believe.

I'm sorry. 84 through 121.

You can take a look at them in the jury room when you are deliberating in this case and I am sure they will be most interesting indeed.

The defense will also point out, no doubt, and they spent some time at this during the cross-examination of Mr. Chadwick, I believe, that there is no direct proof linking the failure of Chadwick to produce these old records in the Grand Jury when requested to any of these defendants. And that is absolutely right. There is no direct proof linking those two events.

But I submit to you that your common sense

tells you, and your own common sense tells you that you can draw that inference for yourself without indirect testimony just as when you are sitting in a room and having walked into that room and it was a sunny day out, and then somebody walks into that room with an umbrella sopping wet, and shaking rain all over himself, you can pretty well deduce without sticking your head out of the window and getting wet yourself that it's raining out.

(Continued on next page.)

l.byLewis

MR. KATZBERG: The same kind of logical inference can be made here.

Now, what I would like to do at this point is to go over the indictment itself.

The indictment contains 13 separate counts, and I would like to relate some of the facts that we have already gone over and some of the specific exhibits in evidence, which are very important, to the charges in the indictment.

Your Honor, do I have timefor that?

Now, count number one: Count number one is a conspiracy charge, and count number one charges the three defendants with conspiring between themselves and with others to cause the Security National Bank to make in excess of $200,000 in illegal contributions.

You can see from the chart, which begins in '63, that the gross total was about $293,000. The indictment charges in excess of $200,000 in illegal contributions from '67 through '74.

You will notice, as the agent estified, the chart only begsin in '68. it was -- that was the first full year of the operation of this system.

Now, as I said, count number one is a conspiracy

charge, that these men conspired to have the bank make these illegal contributions.

Now, you might recall Mr. Ryan's opening on behalf of Mr. Powell when he said, "This is a conspiracy case."

And he started saying about, you know, all different things about a conspiracy. See, the defense wants you to believe that a conspiracy can only be hatched by people with long, handlebar waxed mustaches, wearing trench coats, huddling over someplace in a dark alley or discussing things in men's rooms or a conspiracy can only be hatched by Russian spies. That is not the case.

As the judge will charge you, conspiracy is nothing more than the legal word for an agreement between two or more people to do something which the law forbids, and one person taking one step, one overt act, doing one thing that accomplishes the end of the conspiracy. That's all. That's what a conspiracy is, as the judge will charge you.

So, as Mr. Cohn said, you will see no evidence of any money passing hands in bathrooms here, you will see no conspiratorial conversations in bathrooms. Of course not, we never said there'd be any

testimony or facts about conversations in bathrooms. We're not dealing with washroom attendants here. This is a conspiracy hatched in the executive suite by businessmen, by executives.

This is not the kind of conspiracy that will take place in back alleys between Russian spies or people wearing trench coats huddling over. So the fact that the word is conspiracy, listen to the judge's definition of conspiracy and you will see what that is, that that's an agreement to do something illegal.

And, of course, Mr. Clifford, Mr. Dowd and Mr. Powell are charged with conspiring, being members of this agreement to do something illegal, to make political contributions -- to have the bank make political contributions. And there is no question that these three men entered into an agreement to have the bank make political contributions. There is no question about that at all.

Mr. Clifford and Mr. Dowd by their own testimony started this thing. They had to do it in the first place. Mr. Powell was brought in originally to watch the money. That was his job, that was his job in this plan, in this arrangement, and to supervise

Mrs. Jacob.

Mr. Dowd was to supervise the day-to-day operations, make sure the money came in, where it was going out, tell Mrs. Jaeger who to write checks to.

Mr. Clifford, Mr. Dowd and Mr. Powell, the three of them together were responsible for deciding where the money was going.

Mr. Powell and Mr. Dowd, it was part of this arrangement, this agreement, that they would introduce the officers into this agreement. And, of course, we heard the testimony of all the officers that wereintroduced, prin pally by Mr. Dowd and Mr. Powell.

That was also part of their job in this agreement.

Mr. Powell and Mr. Clifford also had another job and thatwas to finesse these increases past the bord of directors without the board knowing. As you recall, Mr. Powell was the secretary to the board, Mr. Clifford was chairman of the board, and they were responsible for making the presentations to the board of the increases, so it was their part, it was also the function that they served in this agreement, in this plan, in this scheme, in this

conspiracy to handle the board of directors' end of the thing, to make sure the raises went through, the board was never told, and things were kept quite on that front as well.

And of course all of them had the responsibility for handling any threats to the conspiracy, any danger that was posed to the existence, dangers such as the anonymous letter. That's why the three of them are there, because they are all in the thing together and they have all got to take care of it together, so they are all charged with the responsibility for what the indictment calls the concealment aspect of the conspiracy, because this indictment charges not only did these men conspire to cause the bank to make these contributions, that it was also a part of that conspiracy that they would all take steps designed to prevent the disclosure of their activities. And that's what the erasing of the astericks was all about, that's what the conversation between Clifford and David Dowd about the old record is all about, and that's what the meeting with Mr. Langdon is all about, steps designed to prevent disclosure of their activities.

Now, Mr. Cohn on behalf of his client, Mr. Dowd,

has tried to make much of the fact that David Dowd left the bank and never set foot in the bank after September 22nd, 1972.

Well, there may be no question that Mr. Dowd never actually stepped into the bank after September 22nd, 1972, but that doesn't mean that he withdrew from the conspiracy.

Listen to Judge Costantino's charge on withdrawal. That's a legal jargon term, a technical term, when somebody can leave a conspiracy. And listen to the Judge's charge when he tells you that a person is deemed to be continued as part of a conspiracy unless and until he takes affirmative action to disavow or defeat the purpose of the conspiracy, and that mere sessation of activity --

MR. COHN: If your Honor please, I have listened to him charge the law twice now, and I have contained myself, but this is totally improper and I ask that he be restrained from doing this.

THE COURT: I will let them -- I will tell them in my charge, but I don't think you have a right to paraphrase whatever the Court might say.

All right.

MR. KATZBERG: Now, certainly Mr. Dowd may

have left it back. He did not leave the conspiracy, especially the concealment phase of the conspiracy.

For example, the telephone conversation between Mr. Clifford and Mr. Dowd talking about the old records. Clearly these were conversations in furtherance of the concealment aspect, because even though Mr. Dowd was not technically an employee of the Security National Bank, if these people, if the club, if the system were to become public knowledge, Mr. Dowd was in just as much trouble as Mr. Clifford.

So even though he was not at the bank he just -- he had just as much to concern himself with. And that's why there was that conversation in '74, which is obviously part of the conspiracy.

You will also remember Mr. Dutra's testimony. Mr. Dutra told you that in 1974 when he was quoted in that Newsday article, having admitted that raises were given for contributions, he got a phone call from Mr. Dowd, who at that time was working at the Nassau Trust Company, and in that phone call Mr. Dowd said to Mr. Dutra, "You shouldn't be talking to the newspapers."

That's also part of the concealment phase of

this conspiracy, which Mr.Dowd took part in.

You will also recall that Mr. Dutra told you in 1975, just prior to Mr. Dutra appearing in the Grand Jury, Mr. Dutra called Mr. Dowd and Mr. Dowd told him at that time "Well, you know, raises weren't given for political contributions, raises were given to these men for extra work that they were doing."

Obviously Mr. Dowd wanted Mr. Dutra to say that. That's also part of Mr. Dowd's continuing participation in the concealment phase of this conspiracy, even though he did it from the offices of his bank and not the Security National Bank.

Mr. Powell made the same argument and has tried to make the same argument, withdrawal, that in May of 1972 when reaching the retirement age he was no longer an officer, he withdrew, stopped making his contributions. No question that Frank Powell stopped making contributions after that time. But that wasn't his only role in this matter. Mr.Powell continued to be secretary to the board of directors, continued to be a director and continued to be responsible along with Mr. Clifford and Mr. Brogan and for presenting the salary raises to the board

of directors for their approval.

And there is no question, and even after Mr. Powell was a consultant, from 1972 through 1974, new people were brought into the club, new people got salary raises, and Mr. Powell was still handling his end from there as well. So there is no question about that -- obviously Mr. Powell knew the contributions were continuing to be made, and that the very people he introduced in 1967, 1968, 1969 and 1970 were still making contributions.

So Mr. Powell stayed with this thing since after the time he became a consultant.

Now, after the first count in the indictment, the conspiracy count, the indictment charges a number of overt acts in furtherance of the conspiracy, and the Judge will charge you about overt acts.

But a number of the overt acts that are charged are the introduction by either Mr. Dowd or Mr. Powell or Mr. Clifford of various officers into the contributions organizations.

Now, after the conspiracy count, count number two alleges the first of what the law calls substantive violations. It's one violation to conspire to do something, it's another violation to

actually do it.

And count number one charges the first illegal contribution, and it charges the bank, Mr. Clifford and Mr. Powell with the contributions to the Nixon Rally in October of 197.

THE COURT: We'll have a short recess.

MR. KATZBERG: Thank you, your Honor.

(Continued on the next page.)

'L:em
5 P/2

Summation by Mr. Katzberg

Now, you will recall that this was one of the bank checks that was issued and that Mr. Clifford had the bank paid back for it through the contributors. If you look at Exhibit 135, this is a check made payable to the 1970 Journal -- it's October of '72. Mr. Chadwick testified that this was the check that was sent to the Nassau County Republicans, and you can see the endorsement on the back, "Nassau County Republican Committee," for the Nixon rally.

Now, if we also look at Mr. Chadwick's records themselves, we will see that $1,000 contribution reflected. Do you recall that Mr. Chadwick has a lot of records? And one of his records was called the daily log. It is Exhibit 86. And I think you will find this to be a very interesting exhibit as well. This is where Chadwick lists day by day contribution by contribution, amount by amount. It's a daily running record of every contribution from the time Chadwick took over.

Now, if we look at page 22 of Arthur Chadwick's daily log we can see third from the bottom, 10/23, Nassau County Republicans, Nixon Rally, $1,000. My finger is right over here, "Nassau County Nixon Rally."

Mr. Chadwick testified that that check, Exhibit 135, was the check that paid for this. So that obviously, since this is a bank check, there is obviously no question that the Security National Bank, which is charged in count two for making a contribution to the Nixon Rally, is guilty of count two. No question in the world.

And not only is the Security National Bank charged as making the contribution in count two to the Nixon Rally, Mr. Clifford and Mr. Powell are likewise charged as consenting to and causing the bank to make the contribution. Now, there is no question that, as Mr. Casey testified, that Mr. Dutra testified, the three people responsible for deciding what they called major requests -- do you remember that, $500 or more, or if it was for some big shot or something, the major requests -- they were Mr. Clifford, Mr. Dowd and Mr. Powell. And you recall that Mr. Casey testified that Mr. Powell continued in this role, although in a diminished capacity, through 1972.

So obviously this was the kind of contribution approved by Clifford and by Powell.

Now, I'll be the first one to admit that there

is no direct evidence, as there is with some of the other counts, that Mr. Clifford specifically said "Let's pay $1,000 to Nixon," or that Mr. Powell specifically said "Let's pay $1,000 to Nixon." But, ladies and gentlemen, they are charged with consenting and causing, and there is no question that these men caused the system which generated that contribution, and there is no question that when Mr. Clifford found out about the contribution and had the contribution system paying the bank to take back money to itself, he was obviously consenting to that contribution being made. So both Mr. Clifford and Mr. Powell as well as the bank, obviously, are guilty under count two.

Now, count three of the indictment charges another specific illegal contribution by the bank, and that is in January of 1973 Mr. Clifford and Mr. Powell consented to and caused the bank to make a contribution to the Roncallo for Congress Committee, and that the bank made that contribution.

Now, there is no question, ladies and gentlemen, that that contribution was actually made. Again if we look at Mr. Chadwick's records, page 24 of his daily log -- that's why these records are so

important -- the very top of page 24, "Friends of Angelo Roncallo, 9/11/72," and he lists the officers whose individual checks comprised the $1,000. It was paid on 1/10/73, while the request was in September. It wasn't paid until January of '73. And it was $1,000, "Friends of Angelo Roncallo R," Mr. Chadwick said meaning Republican, running for Congress. So there is no question that that contribution was made as charged in count three.

The checks which comprised that contribution, a number of those checks are here for us to see, and they are contained in Exhibit 176-A. We have $200 from George Morse for Friends of Angelo Roncallo, $100 from Mr. Nickerson, Mr. Sly and Mr. Merolla. And you will notice that their names are listed by Chadwick next to the Roncallo contribution.

Each of these men testified that he got a contributions increase, out of which he made these contributions. So there is no question that this money, this bank money was used indirectly, given to the officers to be given back in this form to make the contribution to Angelo Roncallo, as charged in count three. No question about it in the world.

So that there is no question that the bank is guilty of making that contribution charged in count three.

Now again with respect to the individuals named as consenting to and causing that contribution, again the charge is Mr. Clifford and Mr. Powell, and again this is a thousand-dollar contribution, one of the major requests. This is a Congressional campaign, and again while there is no specific evidence -- and I'd be the first one to admit that -- that Mr. A says "Pat Clifford said 'Make this thousand-dollar contribution,'" and there is no direct evidence of that, as the Judge will charge you under Section 2, and as a co-conspirator --

MR. COHN: Your Honor, again I object to what you are going to charge them.

THE COURT: I will charge according to the section mentioned in this count. All right, I will charge them aiding and abetting. That's for the Court.

Go ahead.

MR. KATZBERG: Now, that brings us to count four, and count four charges the bank and Mr. Clifford with making a contribution to the Wydler for Congress Campaign, a $200 contribution. And as we can see in

Exhibit 177-A, there is a $200 check to the Congressional Club endorsed by Citizens for the Reelection of John Wydler, April 5, 1974, by James Lamberton.

Mr. Lamberton of course was a witness at this trial. Mr. Lamberton testified he got the salary raise after agreeing to contribute, and that this check, and all the other checks introduced through Mr. Lamberton, was made pursuant to that arrangement. So there is no question that the $200 contribution was actually made.

In fact Mr. Chadwick's 1974 record bears that out as well. "April, $200 Congressional Club." It's Exhibit 85 in evidence, Mr. Chadwick's records for 1974.

So based on Chadwick's record of the contribution to the Congressional Club, and based on the $200 check, here is the Congressional Club entry from Chadwick, and based on the $200 check, there is no question that the bank made this contribution to it.

(Continued on next page.)

MR. KATZBERG: (continued) Mr. Clifford in 1974 was sometimes in charge and overall in charge of the contributions organization. And, again, while there is no direct evidence that Clifford said, "Pay Weidler the $200 --" and the Judge will instruct you on the law - and there Mr. Clifford's culpability will cover that point as well.

Count 5 charges between September and December of 1972, Mr. Clifford and Mr. Powell consented to and caused the bank to make another political contribution. This one to the Suffolk County Republican Committee between those dates.

Now, again, if you look at Mr. Chadwick's daily log, Exhibit No. 81 -- I am sorry, Exhibit No. 86, we can see that that contribution is reflected there as well. In two separate payments.

Suffolk County Republican Committee, September, $700. DJD. David J. Dowd.

And page number 22, Suffolk County Republican Committee, twenty two hundred for a total of twenty nine hundred dollars. And that was 11/3.

So there's no question that the Suffolk County Republican Committee received almost $3000 at the time charged in the indictment.

And if we take a look at the bank checks -- I'm sorry -- take a look at the individual checks contained in Exhibit 178A, we will see the same familiar faces, the same familiar checks. We get to know their checkbooks already.

Mr. Brogan, Mr. Brooks, Mr. Dickerson. Two from Dickerson. Mr. Merolla for two hundred. Mr. Slight for a hundred. Gargano for a hundred.

Each and everyone of these men whose checks is contained in this exhibit wrote the check pursuant to the system after being given a raise. There's no question that the bank made this political contribution that is reflected by the checks and by Chadwick's records. And there is no question also with respect to these contributions that Mr. Clifford and Mr. Powell consented to and caused this contribution under the law.

Now, Count Number 6 charges another contribution to the Suffolk County Republicans. Again, the same thing shown in Chadwick's records. The checks, all of them, you can look at them. Suffolk County Republican Committee and the dates in question so there is no question that the Security National Bank made the same contribution as charged in Count 6. Mr. Clifford

is charged as causing that contribution.

And the Judge will instruct you that he, too, is liable for that contribution as well.

Now, Count 7 similarly charges another large contribution to the Nassau County Republicans. Again, Chadwick's 1974 records show that contribution. The same checks from the same officers.

Vandermark, Dickerson and the rest of them. They are all available. They all made their checks out of the bank money that was given them specifically for the purpose. So that there is no question that the bank made these contributions as is charged in Count 7.

Chadwick's records showing its '74 records and the checks show it

Now, Count 8 charges that between February and March of 1974 there was a contribution to the Beame Birthday Committee in connection with Beame's mayoralty campaign in 1973.

Now again, the bank is charged with making the contribution. And Mr. Clifford is charged with consenting to and causing the contribution to be made.

And if we look at Mr. Chadwick's records, we will see it's Exhibit No. 85, which is the 1974 records;

that on two occasions, in March of 1974 money was given to the Beame campaign, the Beame Birthday Committee, $500.

March -- Beame Birthday Committee, $2000 for a total of $2500. These two entries right here on Chadwick's records. $2,500 to Abe Beame.

There is no question that that money went to Mr. Beame. Chadwick's records.

Of course, like every other Count, the checks are available as well.

Mause, Doud, Pascuzzi, Hart, Fox, Sligh, Lamberton, the whole same crew. All of their checks, all of these people reimbursed, all of these people were compensated through salary increases. No question that bank money was used to make these contributions.

And, ladies and gentlemen, in this particular count there is also no question that the Beame contribution was caused -- direct proof caused by Pat Clifford, Exhibit No. 110, a letter to Mr. Clifford on the stationery of Citizens for Beame Finance Committee.

"Dear Mr. Clifford:

"Thank you for attending the cocktail party at Abraham Feinberg's apartment last night.

"We greatly appreciate your pledge of 20 tickets

to the 'Beame Birthday Celebration'."

"An invitation describing the event will follow shortly.

"Please make your $5000 personal check payable to 'Beame Birthday Committee'. A respond envelope is enclosed.

"Thanks again."

And it's signed by Arlene Wolf for Irving Goldman, Beame Birthday Committee.

So there is no question, Exhibit 110 shows us that Pat Clifford consented to and caused the contribution to Abe Beame as the evidence shows.

THE COURT: Excuse me.

Do you mind staying until six or would you want to recess now?

You might be able to finish by six.

MR. KATZBERG: No, I will not.

THE COURT: You cannot finish by six?

MR. KATZBERG: No, I will not.

JUROR NO. 4: I think we ought to go home.

MR. KATZBERG: We will not finish.

JUROR NO. 4: Let's try to get home by 8:00 o'clock.

THE COURT: Do you want to go home now?

JUROR NO. 4: Yes.

THE COURT: All right. We will recess. We will recess until tomorrow morning at 10:00 o'clock. We will try to start right on time if we can.

Don't discuss the case. Keep an open mind. Report back to the courtroom.

(Whereupon the jury left the courtroom.)

MR. COHN: Your Honor, I move on behalf of Dave Dowd for a mistrial on the statements made by Mr. Katzberg in the summation concerning David Dowd's alleged involvement in destruction of records.

The evidence in the case does not warrant the inference that he drew to the jury. Mr. Katzberg knows, based upon his investigation, based upon his disclosures made in the trial and based upon disclosures made in conferences with your Honor, particularly with counsel for the witness Chadwick, that none of these defendants were involved at all in deterring Mr. Chadwick from bringing his records to the Grand Jury. Mr. Katzberg knew this. He knew that the gentleman who was involved in this was a Mr. Steven, and notwithstanding the fact that he knew that, he drew inferences to the jury charging David Dowd and Mr. Clifford with being involved in the failure of Mr. Chadwick to produce records before

the Grand Jury.

This is the grossest form of prosecutorial misconduct, when a prosecutor knows the fact to be one thing and deliberately argues and draws inference to a jury as to something else.

Not only that, your Honor, but with regard to the statements attributed to David Dowd by Dutra, I submit that the Dutra testimony substantially showed no such conversation. Mr. Dutra -- particularly with respect to the 1975 conversation, established that he had called Dowd for the purpose of obtaining Mr. Dowd's assistance in getting a lawyer.

With regard to the 1974 conversation, I submit that again the inferences that were drawn by Mr. Katzberg in the testimony of Mr. Dutra are ungrossly unfair and grossly prejudicial.

And for these three reasons, your Honor, I respectfully move for a mistrial.

(Continued on next page)

JB/tk

6pm2

1

MR. NAFTALIS: Your Honor, on behalf of Mr. Clifford, I join one hundred per cent in Mr. Cohen's remarks regarding the Prosecutor's misstatements and misrepresentations regarding Chadwick, which are not only as he said unsupported by the record, but totally contrary to the facts as Mr. Katzberg knows them. And that is a gross violation of a Prosecutor's duty.

In addition, I have four specific other statements I want to call your Honor's attention from Mr. Katzberg's summation.

First, he stated in connection with Mr. Dowd talking to Mr. Dutra, in connection with his grand jury testimony, and he said that that was part of the concealment phase of the conspircay.

Your Honor, that is a misstatement of fact. Because that occurred in 1975. And even the Government says that the conspiracy ended in 1974.

And regarding Mr. Clifford, and also as --

MR. PATTISON: Your Honor, as to --

MR. NAFTALIS: May I finish, please, Mr. Pattison.

Regarding that, I would --

THE COURT: That's just about when the investigation started, as I recall.

MR. HAFTALIS: The indictment says it ended in December of 1974. This conversation occurs in July or

August of 1975. And he told this jury that this was part of the concealment phase of the conspiracy, and, therefore, attempts to link that in with Mr. Clifford and Mr. Powell.

And I would say that I would move for a mistrial on that ground.

In addition, your Honor, Mr. Katzberg stated that a false entry was made on the books and records of the bank relating to those bank checks as part of a cover-up and a phony loan entry. That is a misstatement and contrary to the facts in this record. The record in this case shows that the -- that that entry was made by Mr. Robert Dowd.

And if your Honor will examine his testimony, Robert -- not David -- he regarded that as the correction of an error. He regarded that as perfectly -- a perfectly proper error. And he was instructed to make that entry by neither Mr. Powell, Mr. Clifford or Mr. Dowd. And he said that that was a perfectly proper and honest bookkeeping entry.

Yet, the Prosecutor here, after the only witness in the case who made the entry testifies to one thing, he tells the jury that it was a false and fictitious entry to cover up.

And I would have to move for a mistrial on that

ground.

In addition, I would move for a mistrial on the ground the Prosecutor used the word cover-up and said that these defendants were participating in a cover-up on a number of occasions. That is a violation of a representation that this Prosecutor has made to these defendants on three separate occasions. He made this representation, your Honor, in the pre-trial motion stage when we asked for a severance of the Nixon count on the grounds that there would be some inflammatory remarks among the jury. He said, "I would never make that kind of argument."

And before his opening statement I got a representation from Mr. Katzberg that he would make no such statement in his opening or during the course of this trial.

Two or three days ago, I called Mr. Katzberg and asked him and said to him -- I wanted to put him on notice as to his prior representations regarding -- especially the use of the words cover-up, that he would not use it in this case. And he gave me his assurance -- his assurance that he, as a representative of the United States, wouldn't use it.

And he used it so many times, I couldn't believe it.

MR. KATZBERG: That is not true, your Honor.

MR. NAFTALIS: That is true, Mr. Katzberg.

MR. KATZBERG: Your conversation with me --

MR. BANNIGAN: Just make your record.

MR. NAFTALIS: May I --

MR. COHEN: Calm down.

MR. NAFTALIS: I think that --

MR. PATTISON: That is a charge that I think should be answered. I think he has a right to --

THE COURT: Let him finish the motion.

MR. NAFTALIS: Your Honor, I would be happy to submit an affidavit and go under oath --

THE COURT: You don't have to submit an affidavit. You are arguing a motion.

MR. NAFTALIS: The final thing, your Honor, is I counted eleven separate occasions when Mr. Katzberg stated that either Mr. Powell, Mr. Clifford or Mr. Dowd had lied. He used the word "lied" in connection with Mr. Langdon. There is an indication in this Circuit - United States against White, in which Judge Kaufman specifically admonished prosecutors that the use of the word "lying" and epithets like that that go with the words like cover-up are particularly inappropriate.

And he did it on eleven separate occasions by my count. And I would move for a mistrial on that ground

alone.

MR. BANNIGAN: I join in that.

THE COURT: It's a very dangerous word to use by a prosecutor. But many times it's been attacked by the higher Courts that it is inflammatory in nature and should not be used because it gives a semblance right away. It takes away from the jury exactly what they are supposed to determine, whether or not there is truthful testimony in the case.

MR. BANNIGAN: Your Honor, I have particular --

THE COURT: I can't disagree with you, but I don't know the --

MR. KATZBERG: I want the record to reflect --

MR. BANNIGAN: If you read right -- and I am more familiar with the White case because unfortunately I was the prosecutor in that case.

THE COURT: That's what I said. You have to --

MR. BANNIGAN: The word was used once in that case. And but for the fact that the evidence in that case was overwhelming --

THE COURT: I think it was used in a much stronger context.

MR. BANNIGAN: Hardly, your Honor. I said that you can draw an inference from the evidence that one of the main witnesses for the defense is lying. And it was

a two witness case. It's wholly different than using it eleven times to say that Mr. Powell and Mr. Dowd lied in the Langdon meeting when they didn't say anything. That is a blatant misrepresentation of what took place at that meeting. It's blatantly a misrepresentation and using the most inflammatory language possible.

MR. KATZBERG: I want the record to reflect that I was not -- throughout any of the summations thus far raising my voice. My tone was even. My manner was even. I think that that is very important for the record to reflect that.

Second of all, we have a false statement charge here and a thousand one. We have two counts of that. Plus I think it's --

MR. PATTISON: Unlike White.

MR. KATZBERG: Plus I think it's more than a logical argument to make that these men through their silence added credibility to the misstatements and the mistruths that Mr. Clifford made that day.

MR. PATTISON: Your Honor, may I also point out that unlike White and unlike some other cases which I know the Court is aware of, where the prosecutor characterizes a particular witness that appeared before them as having lied to them, that is where the Court of Appeals strikes hard. In this case where -- plus, in this type

of a case which does not have anything to do with that actual count -- In other words, a drug case or something of that sort. But here we are trying a false statement case among other things.

I mean it's clearly relevant. It's the guts of the case.

MR. BANNIGAN: It is not the guts of the case. When you say that Powell and Dowd, who didn't say a word at the meeting, or the -- or the bank lied --

MR. PATTISON: I don't believe you can find a quote where he said that.

MR. RYAN: We can get it tomorrow.

MR. BANNIGAN: Where they lied?

MR. PATTISON: Supported the lie, yes.

MR. RYAN: Your Honor, on behalf of the defendant Powell, I move for a mistrial on the ground that the Prosecutor deliberately referred to Mr. Powell as participating in a cover-up, and particularly the Casey-Dowd telephone conversation, which Mr. Powell had nothing to do with, and I think it's that reference into that Casey -- as he called it the Casey-Clifford telephone conversation.

THE COURT: He did say something about the Casey-Clifford conversation.

MR. RYAN: We went through this this morning and

your Honor admonished him, but I want to make a record on that.

Secondly, as I said before, when we even opened the trial -- and I've got it on the record, and I will find the record, that Mr. Powell was not involved in the cover-up phase of this case. Then we went to trial. And then they came up with this business about the erasures on certain days. And I raised it as a surprise. And your Honor was kind enough to get some interview reports out. And now we are at the point that Powell is covering up and participating in the Casey-Dowd conversation. And he's going into the Chadwick business, where he didn't produce records. And we are going on and on ad infinitum. And at this point I respectfully move for a mistrial.

THE COURT: All right.

MR. COHEN: I join in the mistrial application on all the grounds stated by my brothers that I didn't mention in my application.

THE COURT: All right. But at the same time I listened to the arguments, and I don't think there are any statements that have been made in which the Court should grant a mistrial. So I deny it.

MR. BANNIGAN: I want to ask you to admonish Mr. Katzberg not to use the word "lie" in this case or the

word "cover-up."

THE COURT: I wouldn't use it much more because --

MR. KATZBERG: All right.

MR. NAFTALIS: Or the word "cover-up."

MR. PATTISON: "Cover-up" is clearly proper.

THE COURT: All right.

MR. PATTISON: Your Honor, can we go over the other topics before you recess?

THE COURT: Not tonight. I am tired.

MR. PATTISON: We are, too.

MR. KATZBERG: We have gone from 3:10 to 4:10. That's one hour. Then we recessed. We went from --

THE COURT: 3:30.

MR. KATZBERG: From --

THE COURT: I mean 4:30 to twenty minutes to six.

MR. KATZBERG: 4:25. That's an hour and ten minutes, which gives us about an hour.

THE COURT: We will see whether you have the hour tomorrow.

MR. PATTISON: Fifty minutes.

MR. KATZBERG: As I say, we are going to need the hour.

THE COURT: We will see. Be here at ten o'clock tomorrow.

(Whereupon, an adjournment was taken to Tuesdya, May 11, 1972 at 10 o'clock a.m.)

THE COURT: All right, are you ready?

MR. KATZBERG: I am ready.

THE COURT: All right, bring in the jury.

MR. BANNIGAN: Your Honor, while we are waiting for the jury, there is something I would like to put on the record.

THE COURT: Yes.

MR. BANNIGAN: Yesterday, at the close of the session, all counsel made a motion to -- as you recall --

THE COURT: Yes.

MR. BANNIGAN: I would like to supplement that motion by stating that on seven separate occasions yesterday Mr. Katzberg expressed his personal belief in the guilt of the bank and the other clients when he stated, "Obviously, the bank is guilty."

I take exception to that and renew my motion for a mistrial.

MR. RYAN: I make the same motion with respect to Mr. Powell.

MR. NAFTALIS: I join in that motion.

MR. KATZBERG: That isn't stating a personal belief.

THE COURT: I will deny it.

MR. KATZBERG: Judge, I may have to spill over past one o'clock.

THE COURT: All right.

(Whereupon, the jury entered the courtroom.)

THE COURT: Good morning. I didn't ask you yesterday, but have any of you read anything about this case at all? That's yesterday and today.

JUROR NO. 7: I can't see you.

THE COURT: I can see you.

All right, move that over here.

My apologies for the delay. The reason that we have been delayed is because I had some school children in from Staten Island, and which I hosted them, giving them a tour of the Court. And then I had naturalization proceedings, which I think is much more impressive and it does do something for them.

It is my personal opinion that the old idea that a child should not go near a courthouse is absolutely wrong. It probably does them more good to come in and see what a courtroom looks like, what a Judge looks like, what the chambers look like, so they get at least some idea that it is not all bad, and not only bad people are in court, but there are good people. There are things being done for people and they get a physical feeling, then, that justice is truly the administration of human opinions with other people. So they meet various types of people

through the officers of the Court and the lawyers and so on. That's what I did this morning.

If that has taken someof your time, I apologize for it. But I do think that I should perform that service.

All right. Now we are ready.

MR. KATZBERG: May I proceed, your Honor?

THE COURT: Yes.

MR. KATZBERG: Ladies and gentlemen, yesterday, we were recounting the charges in the indictment. And I briefly just want to finish up with the charges.

Yesterday, we were at Count No. 8, the count that charges the bank and Mr. Clifford with the Beame Birthday Committee contributions. And that's Exhibit No. 110, which is direct evidence of Mr. Clifford consenting to and causing the bank to make this contribution.

The checks. We also looked at Mr. Chadwick's records of that contribution.

Now, that brings us to Count Nine, which charges that in September of 1972 the Security National Bank made a political contribution in connection with the campaign to elect Bernard Myers to the New York Court of Appeals, and charges all three defendants with consenting to and causing that contribution. And as we

heard from both Mr. Clifford and Mr. Casey, Mr. Clifford told Mr. Casey that he had promised a man by the name of Howard Ickie, Jr., that he would make a contribution to the Bernard Myers campaign. He told Mr. Casey to get $500 from the contribution organization and to send that money over to the Myers campaign.

Now, Mr. Casey identified the checks involved in the Myer's contribution. They are contained in Exhibit 180-A.

And once again, the same individuals who were given money to make the contributions in the first place, Mr. Dowd, Robert Dowd, Mr. Guttlein and Mr. McCabe. And these are the checks. And they are contained in that exhibit.

And once again, Mr. Chadwick's daily log, one of his records, the running record that he kept, reflects that contribution.

And you will notice, as Mr. Chadwick told us, that there was a short period of time in late '72 when he would put the initials of the people he spoke to about those contributions in the left-hand margin. And you will notice that it says, September Contributions Committee To Elect Bernard Myers. It has the people who made the contribution. 200 from Robert Dowd, 100 from Guttlein, 200 from McCabe. Those are the checks

that we just saw. And in the margin, the left-hand margin, are the initials, DD -- David Dowd.

So we see that not only did Mr. Clifford -- that there is direct proof not only from Mr. Clifford's own statements and Mr. Casey's testimony, that Mr. Clifford caused the Myer contribution to be made, but, Chadwick's records show that Dowd did as well.

That brings us to the next count in the indictment, the last of the substantive counts. And that is another one of those bank checks. This is again a direct contribution by the Security National Bank to the Wachtler Dinner, 2500.

Chadwick identified this exhibit, Exhibit 133, as the bank check that was issued to pay for the Wachtler Dinner.

Now, again Mr.Clifford and Mr. Dowd and Mr. Powell are charged along with the bank -- the bank is charged with making the contribution. And obviously, the bank made the contribution with the bank check, bank money.

Now, Mr. Clifford and Mr. Dowd and Mr. Powell are charged with consenting and causing that contribution.

(Continued on next page.)

MR. KATZBERG: (continuing) Now, you will remember when Mr. Clifford took the stand I showed him Exhibit 115, part of Chadwick's records. And I showed him these, and it said, by PJC, meaning Mr. Clifford for campaign of Sol Wachtler, who is being groomed for the next State Attorney General.

This is Sam Gerber. Remember, that Tom Casey told us that Mr. Clifford told him that Sam Gerber who was the one who was calling him and asking why the contribution was late.

Here is Chadwick's notation, Sam Gerber, Nassau County Republicans, per PJC, okay for Wachtler campaign. And even here is the telephone message which corroborates Casey completely, that Mr. Clifford -- Mr. C., yougot a call at 2:40 p.m. on 10/4 from Sam Gerber.

So as Exhibit 115 clearly shows direct proof that Mr. Clifford consented and caused that contribution, Exhibit 102 is the routing slip from David Dowd to S. Johnson, as to who should attend that dinner. So obviously, David Dowd, before he left the bank was involved in the making of this contribution as well. Because you will recall that the dinner took place September 19th, that Mr. Gerber was calling Mr. Clifford because the money hadn't been paid.

So Mr. Dowd, before he left the bank, certainly had something to do with this contribution, even though it was paid after he left the bank because, as you will recall from Mr. Casey's testimony, from Mr. Chadwick's testimony, this was an overdue contribution when they went to this dinner and didn't pay for it, and it wasn't until the issued the bank check in October that the money was actually paid.

Now, you might recall at the close of the Government's case, I read a whole lot of stipulations, agreements between counsel, with respect to the substantive counts. Those stipulations, ladies and gentlemen, are in evidence. I am not going to bother reading them now. But when you are considering the question of whether or not these contributions were made in connection with the elections involved, look at the stipulations. There is one stipulation for each and every one of the counts. And these stipulations, these agreed sets of facts, deal with the aspect of these contributions being made in connection with those elections. So I'll refer your attention to those stipulations.

Count 11 of the indictment charges the defendants with conspiring to misapply bank funds. And by that

we simply mean this: These three defendants are charged with the agreeing to use bank money for an illegal purpose.

In other words, taking money, bank money and illegally applying it to political contributions. And that is what Count 11 is all about.

And listen very carefully to the judge's charge with respect to the elements of the misapplication.

Finally, Count 12 and Count 13 only apply to Mr. Clifford. Count 12 charges Mr. Clifford with misstating a material fact to Mr. Langdon on February 19th with respect to the salary increases, the reimbursement.

MR. NAFTALIS: Your Honor, I must object. I haven't objected before, but that is a misstatement of what the indictment charges.

The indictment says, reimbursements. It says nothing about salary raises.

MR. PATTISON: That's what he said.

THE COURT: You are reading the indictment.

MR. KATZBERG: I didn't read the --

MR. NAFTALIS: He is saying what the indictment charges. He misstated it to the jury. That is not fair.

THE COURT: The evidence charges -- the evidence.

is something different. Completely different from the indictment. Are you talking about the evidence, what you say you have proven by way of evidence? That is one thing. What you're saying about what the indictment says, that is another thing.

All right.

MR. KATZBERG: Count 12 and Count 13 referred to the Langdon meeting, the statements the Government alleges Mr. Clifford made about the salary increases, the reimbursement aspect. And Count 13 relates to the postage stamps.

MR. NAFTALIS: I hate to interrupt, but the indictment doesn't say anything about salary increases. Your Honor instructed him that if he is going to say what the indictment charges he should accurately --

THE COURT: If you are going to say what the indictment says, you must read it. If you are going to paraphrase what the indictment says -- you're saying expenditures mean salary increases. You are not going to do that. That is for the witnesses on the witness stand.

MR. KATZBERG: I didn't --

THE COURT: I understand the same way he said it. I do.

All right.

MR. KATZBERG: May I proceed, your Honor?

THE COURT: Yes, now you may proceed.

MR. KATZBERG: So, ladies and gentlemen, having gone through the entire indictment and all the evidence, it is perfectly obvious that more than $200,000 in illegal political contributions were made by the Security National Bank from late 1967 through 1974. No question about that.

There is also no question about these three defendants, Mr. Clifford, Mr. Dowd and Mr. Powell, set up the system and ran the system which generated that illegal money. There is no question about that either.

(Continued on next page)

And it's far too late in the day for these defendants, in the light of the overwhelming evidence in the Government's case, to deny that the contribution system exists, or to say that the contributions were never made, or to say that salary raises were never given. It is too late for that. So they ask you instead to believe that they did what they did under the mistaken, innocent misapprehension that what they were doing was legal; that the -- despite the fact that all of these illegal monies were generated, they honestly and truly believed that what they were doing was legal.

Now, how does the Government go about proving what was going on in a man's mind at a given time? How can we open up somebody's head to see the inside and the inner workings of somebody's thought processes?

A defendant can tell you virtually anything he wants you to believe about what he thought or felt at a given time. But fortunately we are not limited to self serving statements like that in our search for the truth. We can learn what is going on in a person's mind at a given time when we look at what he said at the time, and most importantly, how he acted. Because we know from our everyday common experience that a

person's actions reveal that that person is thinking; that actions speak louder than words.

And I submit to you, ladies and gentlemen, when we look at the evidence in this case these men and their actions during the period in question, I submit to you when we examine that conduct, it leaves no doubt, no question that these men knew full well that what they were doing was legal.

Now, we start with the fact that we are dealing here with three men of many years of business and banking experience, men who knew the ins and outs of the very complicated and sophisticated banking business. Men who used their energies and their know-how to rise to positions of power in the very competitive and very sophisticated world of big time banking. These men did not get to the executive suite by being shy, naive or unsophisticated. That's for sure.

Now, since banking is an area that is regulated by a number of laws and regulations, these men, just to conduct their business had to be familiar with the regulations and the laws that govern banking. And one of these laws is that a bank cannot make -- directly or indirectly cannot make political contributions. Because if large financial institutions like the Security

National Bank, which was a two billion dollar bank, if they could take their wealth and use that to support candidates for office, that would turn the average citizen into an innocent bystander in the most crucial part of the democratic process, the election of public officials.

So in order to keep these hundreds of thousands of dollars, this concentrated wealth out of the electoral process, the law forbids these large financial giants from using its wealth to support political candidates so the average citizen can mean something.

MR. NAFTALIS: Your Honor, I hate to object. He has no business telling a jury why a law was enacted or the purpose of the law. I haven't objected before, but --

THE COURT: The purpose and intent of the law is for the Court to advise the jury, and you will accept it from the Court, as I told you when you were being selected. I will advise you and tell you what the law is to be applied to the facts in this case.

All right.

MR. KATZBERG: And knowing that bank money could not be used to make contributions, but wanting to do it anyway, these defendants looked for a way around the

law. And in an attempt to convince you that they honestly and truly really believed in their heart of hearts that the way they chose was legal, they want you to believe basically two things:

First, that they acted in an open and aboveboard businesslike manner with respect to the contributions.

And secondly, that they were told by their attorneys that this was legal.

But when we look at the evidence in this case, we will clearly see that they knew full well what they were doing was illegal.

One of the first things that counsel has tried to harp upon during the course of this trial to show you that these men acted in an open way was to stress the fact that these contribution checks were all microfilm. Because these checks are on microfilm, they want you to believe that these defendants therefore acted in an open way. Because anybody could check the microfilm and find the checks.

Ladies and gentlemen, this microfilm point is a meaningless one because not only were the officers' checks on microfilm, but all of the customers, their checks were on microfilm. And we are talking about hundreds of thousands of checks. And not only that,

you would have to know which officers were making the contributions before you could find their checks.

So assuming you took all the time to go through all the microfilm of all the checks, and assuming you know which checks to look for, even if you did that, what would you find? All you would find would be the photocopies of the checks which would look like the individual contributions of the individual officers.

What the microfilm checks do not show, obviously, was the source of the funds. And that's the illegality here. What the microfilm checks would not show is where they got the money from. From the bank.

What the microfilm would not show is who chose the payees of those contributions. The microfilm checks would not show that.

So the microfilm point is meaningless because the microfilm wouldn't show anybody where thatmoney came from. And that's what this case is all about.

The defense also spent a lot of time with respect to how open this thing was, trying to convince you that the whole purpose for these contributions was visibility; that the officers go to these dinners, attend these functions to be visible.

What the defense has neglected to point out about

these visibility points is while the officers may indeed have very well been visible, the source of the money that got them to the dinner, that was invisible. And they purposely kept that invisible.

Now, let's take a look at the way these men acted and we will see quite clearly that they acted in ways which reveal that in their minds and in their hearts they knew full well they were engaged in an illegal enterprise.

We sat with the fact that the officers who testified told you that they were told to treat this in a confidential manner, not to be discussed at the bank.

Ask yourselves this:

If these defendants really believed thatthis system was proper, why the need for the secrecy?

The defendants want you to believe that the officers were told it was confidential because salaries were involved. Do you remember that? And that all salary raises are confidential. And that's why we told them to keep it confidential, because of the salary raises.

But let's go back to the testimony of the officers to see what they were told, and we will see

that they weren't told to keep the salary raises confidential. They were told to keep the arrangement confidential.

Mr. Sly, page 647, responding to a question about what Mr. Powell told him in 1967.

"I was told that it was a confidential arrangement. I really shouldn't discuss it with my associates."

If this arrangement was so proper and so legal, why did it have to be confidential?

And if these men really believed that what they were doing was perfectly proper and perfectly legal, why did they decide to use a secretary's name on the account? Why not call it the Patrick J. Clifford account? Why not call it the David J. Dowd or the Frank B. Powell account? Indeed, why not call it the Security National Bank Political Contributions Account?

If these men honestly believed that there is nothing wrong in it, why hide behind Betty Jaeger? If these officers really believed that it was legal and proper to give officers salary raises, that that was perfectly legal and perfectly appropriate, why didn't they tell the Board of Directors about it? Why did they have to keep it a secret from their own Board of Directors?

And not only this fact borne out by the Board of Director minutes which show nothing at all about any conversations of any contributions club or any explanation that any of these salaries were going for the contributions, and not only did the minutes specifically approve that, but Mrs. Reddy told you -- Mrs. Reddy was the one that -- the secretary who wrote out the minutes -- she told you that she didn't remember anything in the minutes about that. And Mr. Braun, who was a director for all these years, told you that he doesn't remember a single discussion of the contributions - the fact that the contributions were being made, let alone being asked to approve contribution increases.

The fact that these raises were kept a secret from the Board -- that fact by itself -- forgetting everything else in the case. Just that one fact, that they felt compelled to keep these raises a secret from the Board, that fact standing alone by itself, is proof that these men knew full well that those salary raises were illegal. Otherwise, why not tell the Board?

But, ladies and gentlemen, in addition to that, there is still more - more evidence that these men knew full well that what they were doing was illegal.

You'll remember 1968, as we have already discussed,

Mr. Powell told Mr. Brogan to mark the Visi records in a discreet way to show the contribution increases.

Now, if these monies were really the officers own money, why did they have to be set aside and marked in a special way to set it apart from the rest of the man's money? And if there is nothing wrong with these raises why did they have to mark it in sucha secret, particular way that only a few selected people would know what it meant.

But, ladies and gentlemen, even this secret sign was more open and more candid that these men felt that they could be about these raises. Because when Mr. Langdon showed up in 1971 to discuss that anonymous letter, and the threat of exposure becomes real, all of a sudden the asterisks are erased. Just in case Langdon decided to chuck the records, it was too risky to have even this most cryptic, clandestine reference to the salary raises. If there is nothing wrong with the raises, why erase the asterisks?

But, ladies and gentlemen, there is still more. There is still more evidence that these men knew full well what they were doing was illegal and acted accordingly. Why was this system so roundabout? Why was it so complicated? Why were there so many changes

from Betty Jaeger to the Long Island Public Affairs Club, to Arthur Chadwick?

Tom Casey, one of the insiders on this thing gave us the reason. Page 1320, when he told us about a conversation -- one of a number of conversations that he had with David Dowd in 1970.

(Continued on next page)

"We have this whole series of conversations. And as a result of these, there was the change from the Betty Jaeger to the Long Island Public Affairs, to the individual contribution system. And the reason for these changes and the subject of the conversation was quote how may the bank make contributions in a cosmetic manner. End of quote. Because we all knew that bank contributions were prohibited by law. the Corrupt Practice Act prohibited that. And the question of how we could -- the question was, how could the contributions be made so that they would appear to be made on behalf of individuals."

That's why this was so round-about. Again, appearance. Because these men knew all too well that this was an illegal charade, and while they didn't want to change the reality of what was going on, at least what they could do was to make it look good, to be careful not to get caught. And that is why, for example, Mr. Powell cautioned Mr. Casey in 1971 to be careful in the manner he was handling the contributions.

Page 1328. Mr. Casey.

"I had an occasion to go to Mr. Powell for approval of a specific contribution."

This is in 1971.

"I think I couldn't reach Mr. Powell at the time. And I asked Mr. Dowd for his approval on this particular contribution. That's why I went to his office.

"Question: What was the conversation?

"Answer by Mr. Casey: He approved the conversation and he cautioned me that we had to be very careful about the contribution system, because if they became a matter of public knowledge, it would certainly become a very awkward, to say the least, and all of us who were participating would be in trouble."

Ladies and gentlemen, it's because of these damning conversations between Mr. Casey and Mr. Dowd, and Mr. Casey and Mr. Powell, that the defense on cross examination tried so hard to attack Mr. Casey. Because these conversations, which I submit are wholly consistent with everything else we know about this case, because in these conversations Mr. Powell and Mr. Dowd revealed that they knew full well what was going on was illegal. So, of course, the defense doesn't want you to believe Tom Casey. Of course, they want you to think that he's making everything up. Because his testimony standing alone by itself is enough evidence to convince you that these men knew -- Mr. Powell and Mr. Dowd -- that this system was illegal.

So you should ask yourselves, is Mr. Casey making all of this up? Is his testimony consistent or is it inconsistent with everything else that we know about the case?

Ask yourselves this: If Tom Casey is making all this up in order to frame these men, why didn't he make up a good juicy conversation with Pat Clifford, where Pat Clifford revealed that he, too, believed it to be illegal? Why didn't he do that?

You might remember, I asked Casey specifically, page 1327:

"Now, did you ever speak to Mr. Clifford about any legal aspects of the club?"

Answer by Mr. Casey:

"No."

If he was making something up to frame these men, why didn't he make something up about Mr. Clifford? The answer is that Tom Casey told you the truth. there was conversation with Mr. Dowd. There were conversations with Mr. Powell. But there were no conversations about the illegality with Mr. Clifford. It's as simple as all that.

Ladies and gentlemen, Tom Casey told you the truth, even though by doing so he had to admit his own

wrong-doing in this matter. And I'm sure you realize that those admissions of his own participation in this illegal scheme will not help him very much as a lawyer or as a counselman. That's for sure. But the truth is the truth. And that was Tom Casey's deal. He would not be indicted so long as he told the complete truth, even if that meant admitting his own participation in an illegal scheme.

But, ladies and gentlemen, there is also one other person on the inside of this scheme that we have heard from. Another one of the co-conspirators in addition to Tom Casey, and that was Joe Dutra. And Joe Dutra also gave us direct evidence that these men knew full well that the salary increases were illegal, when he told us about the conversation between Mr. Clifford and Mr. Dowd, Mr. Powell and himself when Pat Clifford announced that Bill Shea or the Shea firm reviewed the contributions system and found it to be illegal, and they discussed what was illegal about it, Mr. Clifford and Mr. Dowd and Mr. Powell.

Page 4477. Mr. Dutra was present.

"The bank had been advised by counsel that the method of responding to requests for political contributions had to be changed, and that there were two factors

that were a problem. One was compensation of the officers, and the other was the maintenance of the bank account from which the checks were written."

So they discussed in March of 1970 the fact that the compensation, the raises were illegal.

Did that stop them? Did they discontinue the practice? No.

All they did was change the name from Betty Jaeger to Long Island Public Affairs Club. That's all they did.

But, ladies and gentlemen, there is still even more. In addition to telling the officers to keep it confidential, in addition to keeping the raises from the board, in addition to the asterisks, in addition to the erasures, in addition to Casey's testimony, in addition to Dutra's testimony, there is still more evidence of these individuals' guilty knowledge, and that evidence is contained in exhibit 162, the Wall Street Journal article.

Ladies and gentlemen, during your deliberations you can ask to see this article and read it for yourself. It is dated November 21, 1969. And Mr. Powell bracketed and circled two paragraphs about this article. The paragraph before that refers to a speech made by the Commissioner of the Internal Revenue Service.

"In a speech to the Tax Executives' Institute, Commissioner Thrower of the I.R.S. recently outlined some of the quote cynical end of quote practices being uncovered by his agents that involve quote criminal conspiracies end of quote among politicians and executives to defraud the government."

And one of the cynical practices in one of these criminal conspiracies that the Commissioner of the Internal Revenue Service was telling these people about was the one that Frank Powell circled. And what does he circle? The paragraph that contains this language:

"Others grant bonuses to their executives with the understanding that they'll contribute individually to political campaigns (keeping enough to take care of the tax bite on their added income)."

(continued next page)

When you bring this article into the jury room with you and read it ask yourselves what this would have meant to you.

Ask yourselves how any intelligent person reading this article could have come to any other conclusion in the world but that what was going on at the Security National Bank was illegal and no less an authority than the Commissioner of the Internal Revenue Service said so.

When you read this article to yourselves you ask yourselves what would have this article meant to me, what would I have concluded from this?

Obvisouly this article put these defendants on direct notice that they couldn't do what they were doing, that such a practice in the opinion of the Commissioner of the Internal Revenue Service was a criminal conspiracy.

And yet even though this article standing alone by itself, forgetting everything else, even though this article by itself proves that Mr. Dowd and Mr. Powell, who read this article, must have known that what they were doing was illegal, even though this article, standing by itself, proves that there is still more, more evidence that these men knew full well what they were doing was an illegal conspiracy

to defraud.

What about the mistruth that Mr. Clifford told Mr. Langdon on February 19th, 1971, right in the middle of the conspiracy? If Mr. Clifford really believed the system was legal, why deny the one aspect that made it illegal? And if Mr. Dowd and Mr. Powell really believed that they could do what they were doing, that counsel had approved it, why did they sit there silently when those mistruths were told to Mr. Langdon?

I submit to you that the Langdon meeting by itself, forgetting everything else, just the Langdon meeting, is proof enough that these men knew what they were doing was illegal.

Ladies and gentlemen, there is still more. Do you recall that when this investigation began in the spring of 1974, thereafter a number of the officers of the bank were interviewed by agents of the Federal Bureau of Investigation and they were asked what they knew about the contribution system.

And you will recall that one of those officers who was interviewed by the FBI was a man by the name of Steven Corriss, and you remember that Steven Corriss, a man from Florida, was Pat

3

Katzberg

Clifford's very first witness, the very first witness in the defense case. And you might recall on cross-examination I asked Steven Corriss isn't it true that after you spoke to the FBI you told Pat Clifford that you told the FBI that you was the one who introduced you to the club?

"Answer: Yes.

"Question: And isn't it true that Mr. Clifford didn't remember the introduction into the club at that time?

"Answer: Yes.

"Question: Now, of course when Mr. Clifford took the stand, now he remembers he introduced Mr. Corrisss. And now he says that he remembered it back in 1974, when Mr. Corriss reminded him of it. But that is not what Mr. Corriss said, Mr. Clifford, his own witness.

Page 2598:

"Question: Isn't it a further fact that when you told Mr. Clifford that you told the FBI he was the one he denied that?

"That is correct.

"Question: Isn't it further a fact that Mr. Clifford at that time told you 'I don't recall every having met with you, it couldn't have been me.'

"Answer: ..Yes.

"Question: What did you say?

"Answer: He definitely was wrong. I recall it vivdly, Mr. Lowe was present and he may have forgotten it. There was absolutely no question in my mind that that's the way it was.

"Question: Even after you reminded him of Mr. Lowe's presence, isn't it further a fact that Mr. Clifford said he still had no recollection and doubted very much that it was him?

"Answer: That's what he told me, but Mr. Corriss wasn't the only one who was interviewed by the FBI and spoke to Pat Clifford afterward."

You remember a Government witness by the name of Ralph Groskoph.

Mr. Groskoph testified that he too had been interviewed by the FBI and after speaking to the FBI he told Mr. Clifford that he had been down to speak with the FBI and there was a brief conversation about that.

Page 1890. Mr. Groskoph: "He knew" meaning Mr. Clifford, "He knew where I was the previous afternoon in the event he had to get hold of me for any emergency within the bank. To the best of my recollection he asked how things went, and I just

replied 'Fine."

"Then Mr. Clifford indicated to me that he was shocked that a contribution system had been set up, and he was totally unaware of it."

What does that mean to us, when Mr. Clifford denies introducing Corriss into the club, couldn't remember that once the investigation started, and told Ralph Groskoph that he was shocked, that he was totally unaware that a contribution system was in existence. Do people who honestly and truly believe that what they were doing was illegal deny the existence of whatthey knew full well took place? Is that consistent with innocence -- innocent knowledge or guilty knowledge? And not only is Mr. Clifford's testimony at odds with Mr. Corriss, his own witness, and with Mr. Groskoph's testimony, it's at odds with Mr. Langdon's testimony, and Mr. Brogan's testimony.

You recall that Jim Brogan said in late '67 in the presence of David Dowd Pat Clifford introduced him into the club. And Mr. Clifford denied that.

But when he denies that he's also indirectly contradicting what David Dowd told you. Mr. Dowd said on page 3979 that Mr. Clifford " Very well could have" introduced Mr. Brogan.

6

Katzberg

Now, Mr. Clifford, Mr. Dowd and Mr. Powell, despite all of these facts which prove their guilty knowledge, they want you to believe that they had no idea what they were doing was illegal. And that is really quite ironic.

And why do I say that? Because while the three people who started the thing and who ran the thing, while these three people professed to have never thought there was anything wrong with it, a number of the lower echelon participants had very serious reservations about this thing.

Mr. Casey, for one, admitted that he knew it was illegal. Mr. Travers that he didn't want to join but he felt that he was fairly down the line and that he had to.

Mr. Dutra also didn't want to get involved but he felt that he had to. Jack Fretz, the very first witness, he felt so positively about this thing, he wouldn't even use his own checks to make the contributions, he paid by money order instead. That's how highly Jack Fretz thought of this.

And, of course, Harry Melcher, Harry Melcher was so convinced of the illegality of this thing that he wronte an anonymous letter to the Controller of

Currenty in order to stop it. If people like Melcher and Casey, people who did not know that the raises were not ever approved by the board, people who did not know the astericks and the erasures, people who did not see this Wall Street Journal article, these people still knew that this contribution system was an illegal fraud.

And if they knew how could these three defendants, the very people who hid the erasures from the board, the people who were responsible for the astericks and erasures, the people who read the Wall Street Journal article, the people who concelaed the facts from Mr. Langdon, how could these people, the defendants, how could they not have known that what they were doing was illegal?

And, ladies and gentlemen, when you are deciding this case, ask yourselves this, is it a coincidence, is it mere happenstance that almost all of these officers, when they were first approached by either Mr. Clifford, Mr. Dowd or Mr. Powell immediately questioned the legality of it?

They said, you know, "Is this legal, can we do this?"

Why did so many officers immediately question

the legality of this thing? The answer is because on the face of it it was obviously illegal, and ladies and gentlemen, that locality brings us to the way these defendants tried to convince those officers that even though it looked illegal it was really legal, and the way they are now trying to convince you that they mistakenly, innocently believed that their system was legal.

And that is their so-called reliance on the advice of counsel, the same self-serving statements they made to the officers to get them to join them, they are repeating to you now.

Of course they told the officers it was approved by counsel, what else are they going to tell them? "No, it's illegal, but I'm asking you to do it anyway? And now they are repeating those statements to you.

But, ladies and gentlemen, you are in a lot better position than the officers were, you know a lot more about this than they do.

You know this claim that counsel said it was has a rather familiar ring to it, doesn't it? It sounds very much like another claim these men made, a claim you know is false, a claim that the Controller

of Currency's office approved this.

MR. Powell told that to Mr. Lamberton way back in 1967, page905. This is Mr. Lamberton testifying to what Powell told him in '67.

"He informed me that he -- it had been clear through counsel and the Controller of Currency's office.

"Question: Both had cleared it; is that correct?

"Answer: Yes."

Mr. Clifford told the same thing to Robert Dowd, that the Controller approved it, after the Langdon meeting. And Mr. Dowd told that to Tom Casey after the Langdon meeting.

Ladies and gentlemen, we know that thatclaim is not true. Mr. Langdon never gave his approval for this system, Mr. Clifford knew that in '71 and he knew it now.

So we should ask ourselves if counsel, if our lawyers, really did approve this system why was it necessary to make up a story that the Controller gave his approval? Or maybe counsel gave the same kind of non-approval that the Controller did, or maybe counsel was given the same kind of reasons for

Mr. Langdon was.

But most importantly, ladies and gentlemen, when w consider this so-called advice of counsel defense, when you consider it, you know that these defendants acted in ways that are wholly inconsistent with any human being believing that what he was doing was legal.

Moreover, you have the advantage of hearing from the lawyers directly yourselves, because while so much has been said by so many different people during the conspiracy and during this trial about what the lawyers said, and what the lawyers did not say, there is only one person in the universe who claims to have actually spoken to a lawyer and discussed the salary raises with him, and that is David Dowd.

Nobody else in the world. Not even Pat Clifford. The friend and close associate of Bill Shea through all these years, not even Pat Clifford can recall one single conversation with Bill Shea about the raises.

Moreoever, you may recall when Mr. Clifford testified on direct examination that his lawyer, Mr. Naftalis, he said "Oh, I'm sure Bill Shea knew all about the club."

Katzberg

But you might also recall that when Mr. Clifford was asked on cross-examination, Mr. Clifford couldn't recall a single conversation with Bill Shea about the raises.

Page 3370: Question on Cross-examination:

"Question: When for the first time did you and Mr. Shea discuss the fact that officers at the bank were receiving money from the bank in the form of salary increases to make political contributions?

"By MR. CLIFFORD: I don't recall specific discussions on that. I assume -- I assume when Mr. Dowd came back from his discussion with Mr. De Gennaro that Mr. Shea would have learned, because Mr. De Gennaro was very close to Mr. Shea.

"Question: You never discussed with Bill Shea at any time the fact that officers at the bank were receiving salary increases for the purpose of making political contributions?

"Answer: I do not recall that I did.

"Question: You are basing your reliance upon the opinion of the Shea firm on what Mr. Dowd told you he discussed with De Gennaro?

"Answer: Yes.

"Question: You didn't speak to Mr. De Gennaro?

"Answer: No."

Mr. Clifford is asking you to believe that even though he and Bill Shea were such close associates for over seven years, even though they had almost daily contact, even though Mr.Clifford had an office right next door to Bill Shea at the Shea firm, and even though Mr. Clifford and Mr. Shea regularly discussed the business of the bank, because Mr. Clifford valued Mr. Shea's opinion so much, despite all of that close contact, Mr. Clifford wants you to believe that he never once spoke to Mr. Shea about the salary increases. Is that believable?

(Continued on the next page.)

Is that conceivable? Is that remotely possible? Or does Mr. Clifford have to go to hide?

Mr. Powell admits that he too never spoke to Mr. Shea about the raises, even though Frank Powell and Bill Shea were both members of the board of directors of the Security National Bank from 1969 through 1974, Mr. Powell admits that he and Shea never discussed the raises.

Mr. Powell also says that he and De Gennaro never discussed the raises, and that's really ironic.

Mr. Powell is the one who clips out the Wall Street Journal article, circled the paragraph about bonusses being given to officers to contribute, puts in the upper-right-hand corner "George, I would like to talk to you about this: and then he tells you that when he and George De Gennaro had a phone conversation about that article, they did not discuss the very paragraph that was circled. Is that possible, is that conceivable? That you would circle a paragraph in an article, clip it out and ship it off to your lawyer, put a note there that you want to talk to him about it, and then somehow by some freak, some accident, you and that lawyer don't discuss the very paragraph that you circled but talk about something else? Is that believable?

So when it comes right down to it all we have is David Dowd. Nobody else spoke to any lawyer about any salary raises.

And, ladies and gentlemen, when you are considering the question of the advice of counsel, good faith advice, good faith request, ask yourselves this: Why is there no written opinion? Why did these experienced, knowledgeable bankers ever put in a letter, a memorandum, anything, why didn't they write down the system, ship it off to the firm and say "Give us an opinion?"

Why didn't they do that? This is especially crucial when we consider the fact that there were other written legal opinions they got from counsel on many other areas, including giving of political loans, the making of political loans, which is covered by the same statute as political contributions?

And yet there is no written legal opinion on this subject.

Ladies and gentlemen, ask yourselves this:

There are literally hundreds of documents in evidence, hundreds of pieces of paper that have been marked in evidence. Why is it that of all of these hundreds of documents there is only one piece

of paper, one out of hundreds, which is the words, says in substance or directly "Salary raises, given for the purpose of making political contributions." only one piece of paper out of all the hundreds of documents in evidence.

And do you know what that one piece of paper is? Harry Melcher's anonymous letter. That's the only piece of paper in this whole case which says in writing that the salary increases were being given for the contributions, and that letter was written in order to stop the contribution system.

Is it an accident that nobody put anything down in writing about this? Is it a coincidence or was it intentional?

And so all we have, we have nothing in writing, nothing from Mr. Clifford, nothing from Mr. Powell, all we have is David Dowd's work signature, because after all the lawyers denied it. You heard from them. They were called as defense witnesses.

Mr. Ryan called them on behalf of Mr. Powell. Did these lawyers corroborate the defense claim? No, they denied it, and they denied it forcefully.

Now, if Mr. Shea and Mr. De Gennaro were going to tell the truth and obviously the statements by

Mr. Dowd are not to be believed and it is just one bit of evidence added to the already overwhelming case that they full well knew what they were doing, they knew it was illegal.

But let's look at the other possibility, the one that these defendants want you so desperately to believe. That Mr. Shea and MR. De Gennaro, these big-time lawyers who billed their clients millions of dollars for their legal advice, that these legal hot-shots misread the statute, made a mistake?

MR. NAFTALIS: Your Honor, I object. That's not our argument at all.

MR. COHN: That's not our argument. We say they gave them proper advice and this whole scheme is legal and they can say it's legal until the cows come home and that doesn't make it legal.

MR. KATZBERG: That was the statement, your Honor.

MR. NAFTALIS: It was not, Mr. Katzberg, and you know it.

THE COURT: All right.

MR. KATZBERG: Moreover that Mr. Shea and Mr. De Gennaro are dastardly men, men who would like, men who would sell their former friends and clients

17

down the river in order to protect themselves, men who would commit perjury in order to do that, let's assume that that's true for the moment, and ladies and gentlemen, let us look at that.

Let's look at the advice that Mr. Dowd claims he got from George De Gennaro.

(Continued on the next page.)

MR. KATZBERG (Continuing) What was that advice? First that banks cannot make political contributions. You know that.

Second, that officers could contribute out of their own money.

Third, that salary increases could be given to officers so long as the officer could stop contributing at any time and keep the money.

Fourth, that the officer had to be able to spend that money as he saw fit.

And finally, that the system had to be totally and completely voluntary, the people participating had to do so voluntarily.

Did they follow that advice? No, as all of the officers testified, and as Mr. Dowd had to admit, none of the officers who received those contributions increases was ever told at any time that he could stop making the contributions and keep the money. Nobody was ever told that.

Why not?

Obviously, because they ran the risk that the officer would make $100 contribution one month and pocket the rest of the money, and they obviously couldn't generate any contributions that way.

So of course these officers weren't told they could stop contributing and keep the money, so that bit of advice was not followed.

Secondly, these men were not able to spend these money as they saw fit, this money was given to them for a specific purpose, to be spent as the defendants saw fit, not as they saw fit.

To use Mr. Dowd's own words, these men had a moral commitment to pay this money back. If they were spending this money as they saw fit, how come they didn't even know until the Arthur Chadwick system took place where the money was going that they were spending as they saw fit?

Now, defense counsel during the course of this case has gone to some great lengths to find out the number of the officers didn't pay a full $1,200 each year, and that's supposed to convince you that it was their own money to spend as they wanted. And you might recall one of the defense witnesses in this connection was a man by the name of McEnerny. Remember Mr. McEnerny told you that in the latter part of 1971 he was sick, and because he was sick he didn't make any political contributions. Do you remember his testimony? And you are supposed to believe that because McEnerny

didn't make contributions at that time because he was sick, that that's proof that it was his own money and that he could do what he wanted with it.

Ladies and gentlemen, look at Arthur Chadwick's record. It's Exhibit 89, of the individual accounts, and turn to Mr. McEnerny's records. What does it show? It shows indeed that from July to December Mr. McEnerny did not make contributions. These words are written next to that: "Exempt, illness, okay, D. Dowd."

In other words, Mr. McEnerny had to get David Dowd's approval before he could be exempt from making a contribution. So how could it possibly be said that this was Mr. McEnerny's own money to be spent as he saw fit, when he needed David Dowd's approval in order to stop making contributions for six months?

Take a look at these Chadwick records. They will show you a lot. So much with respect to the aspect of the legal advice that these men had to be able to spend the money as they saw fit.

THE COURT: I think you should start winding up now. You have had all the time you should have had. I have given you more time.

All right, start winding up.

MR. KATZBERG: So that bit of advice wasn't

followed, either. And listen to the judge's advice on the instructions, that advice should be strictly followed.

MR. NAFTALIS: Your Honor, I object.

MR. COHN: Your Honor, I object to him telling us the law.

THE COURT: Go ahead.

MR. KATZBERG: But most important, ladies and gentlemen, when we come to this advice of counsel defense, Mr. Dowd should not be believed, because despite his statements this system was not voluntary, and he knew it. Mr. Dowd said Mr. Brooks had a choice. Mr. Brooks told you he had no choice.

Mr. Dowd said he asked Brooks whether he wanted to join or not. Mr. Brooks said he was already in.

Mr. Dowd said Mr. Bradley was given a choice. Mr. Bradley said he only agreed half-heartedly. Mr. Bradley said he told Mr. Dowd he would only join if he had to. Mr. Dowd denies that.

Mr. Dowd says he gave Mr. Vandermark a choice. Mr. Vandermark says he agreed only half-heartedly. Mr. Dowd says he gave Mr. Gargano a choice. Mr. Gargano said that he had no choice.

So obviously, the advice of counsel wasn't

followed with respect to the voluntariness, either.

Now, there is, however, a third possibility here, and that is this: that Mr. Shea and Mr. DeGenaro and these defendants were playing a cynical game, a game where the defendants would just tell the attorneys enough but not too much about the system, and the attorneys would wink their eye and let them do what they wanted. And in that way the attorneys could keep the bank happy, the bank got what it wanted, and the lawyers could keep the bank happy by turning their back and winking their eye and not ever really being told what was really going on.

Mr. Dowd would tell Mr. DeGenaro just enough but not too much, so that they could tailor-make their system to give the appearance of legality.

Mr. DeGenaro would be safe because Mr. Dowd would never really tell him specifically anything about the crucial illegality of the system, there would be nothing in writing, so that everybody could be really protected. And that explains why there was nothing in writing, that explains why there was nothing, no legal written opinion, because the third explanation is that these defendants and those lawyers played this bad faith, cynical game.

The lawyers closed their eyes, gave them the wink of an eye, never really knew exactly what was going on, never really specifically approved anything, but turned their backs to it instead.

Ladies and gentlemen, that third explanation, the cynical game that may have been played among these defendants and attorneys, that explains why these men acted in the ways they acted, because they knew they didn't get counsel's approval. All they got was the wink of an eye and a word of caution, and nothing more. And that's why they acted the way they acted.

But regardless of which of the three possibilities is true, that Mr. Shea and Mr. DeGenaro were telling the truth, that they are lying about the advice that they gave, or that they played a cynical game with the defendants, the bottom line of this thing is that these defendants acted in ways which obviously show that they knew full well that what they were doing was illegal, and it's because of their obvious actions, the overwhelming actions of these men, that we know that regardless of what counsel may or may not have said, these men knew full well what they were doing was illegal, and that is why this advice of counsel defense makes no sense.

If a lawyer tells a man he can go out and rob a bank, or if he winks his eye and doesn't stop the man, and he tells him he's going to do that, and then the man robs the bank, can the man then turn around and say, "I thought it was legal"? Of course not. All three of these defendants knew full well that what they were doing was illegal, but they did it anyway, because these defendants felt that it was more important to make money for the bank than to comply with the law.

And during the course of this trial defense counsel have tried to make so much of the fact that what these defendants did they did for the good of the bank. Ladies and gentlemen, that is no excuse. If they, for the good of the bank robbed the Chase Manhattan Bank of $2 million and deposited that money --

MR. COHN: Objection. This is ridiculous.

THE COURT: A very bad comparison. Very bad comparison.

All right.

MR. KATZBERG: I have a few moments, your Honor, and I will be finished.

The question is what crimes will society permit its executives and its bankers to commit in the name of business success? The answer is, and the answer must be,

that businessmen cannot break the law in order to help their businesses, any more than anybody else can break the law to help themselves.

Ladies and gentlemen, the proof of the guilt of these defendants is overwhelming, and based on that overwhelming proof I ask you to return the only verdict consistent with both common sense and the overwhelming proof in this case, that these defendants did what they did and knew that it was illegal, and that they are guilty as charged.

I thank you for your time. I thank you for your patience.

I am finished, Judge.

THE COURT: All right, now, we'll take a recess, and be back at about two, two fifteen, and we will start at that time.

Do not discuss the case.

(Jury out.)

THE COURT: Recess until two o'clock. I will be here to do whatever you want.

(Luncheon recess.)

AFTERNOON SESSION

2:15 o'clock p.m.

(The following occurred in the absence of the jury.)

THE COURT: All right, be seated.

MR. COHN: I think Mr. Naftalis has a statement to bring to your attention.

MR. RYAN: I have one too, your Honor.

I have a request to charge based on the Pipefitters case, that the statute doesn't prohibit the bank from deciding where the money can go from segregated funds. And I renew that request because the prosecutor is claiming that the evidence of involuntariness was that the bankers didn't know where the monies would eventually go. There is absolutely nothing wrong with the fact that the bank decided what organization should be given checks.

And I renew that request and I ask your Honor to consider it.

MR. PATTISON; He didn't say that. That wasn't the setting in which he said that. He said that in the setting of his point as to whose money was it and whose club was it.

MR. RYAN: Well, we should have the transcript tomorrow. I will point it out. Let us wait.

THE COURT: All right, let's wait for the transcript.

Do you have something to say?

MR. NAFTALIS: Yes, I have a couple of motions.

THECOURT: All right, you had better hurry up befcre I bring the jury out.

MR. NAFTALIS: Your Honor, I would move on behalf of the defendant Clifford for a mistrial based upon certain statements made in Mr. Katzberg's summation this morning.

First point to the fact that -- and I think the record will reflect this -- that Mr. Katzberg vouched for the credibility of the witness Casey when he told this jury -- when he told the jury something directly, according to my notes, that Tom Casey told the truth to you, which was a staetment of the prosecutor that he believed Mr. Casey was truthful.

In addition he made other statements to that effect which are vouching. He made statements like: "This is a claim that you all know is false." He made other statements like: We know that these men knew what they were doing was illegal, and put his credibility on the line.

And finally told the jury at the end that the evidence of guilt here is overwhelming, instead of

saying that you may find that the evidence was so developed. He stated it in his personal terms, and I move for a mistrial on those grounds , your Honor.

MR. BANNIGAN: I will join in the motion.

MR. PATTISON: I fail to see the merit in one of these points, any one of them. I think to say that Casey told the truth is quite obvious, the prosecutors and the lawyers claim that. He doesn't say I think Casey told the truth. Had he said that then there indeed would be some merit to it. But to say that Casey told the truth, if that can't be said, your Honor, then I submit that none of the lawyers here can say that their clients told the truth.

THE COURT: The problem isn't that. I agree that the statement made, although it may have a semblance of some impropriety, as to having the jury believe that he himself believes that only his witnesses are truthful and the other witnesses are liars, did not in my opinion reach that perspective by way of a statement, but it came quite close at times. And I think you noticed that I was kind of concerned at some of the statements being made.

MR. PATTISON: I did at one point, your Honor, with regard to the portion of the argument about the defendants' claims.

THE COURT: I am still at this point in an area of not full agreement with myself as to whether or not he had a right to identify the person in the article, the Wall Street Journal article, and say that that person was an expert whose opinion must be accepted by the jury.

I have a horrible feeling -- I am not certain whether I am right or not -- but I have a horrible feeling that it borders fairly close, fairly close, on the statement that shouldn't be made to a jury because the person, if he was an expert, must have been brought to this courtroom to be examined, and then if the Court saw fit, to have him placed as an expert as to what he believed the law was, which he couldn't do in the first place. He said since he thought that the law had been violated, and it was illegal to do those things, he said it as an expert, and that wasn't right. It is not grounds for a mistrial however --

MR. NAFTALIS: I should also like in connection with --

THE COURT: My impression of the summation -- I will tell you one thing -- it is going to cause some problems. All right.

MR. NAFTALIS: Your Honor, in connection with

that I should point out --

THE COURT: You can take liberties, but not too many.

MR. NAFTALIS: When that article was first received in the Government's case I believe Mr. Korman in arguing to the defense -- for the prosecution in the case -- pointed out that that article was not being received for its truth. Clearly Mr. Katzberg used it that way.

MR. KATZBERG: It wasn't used that way.

MR. PATTISON: I think the record would show the entire point was what was the reaction upon reading this. It was state of mind, that is all.

THE COURT: If I recall the words used, and I don't have the minutes before me, that the IRS commissioner, who is an expert and who says in this article that it is illegal to do what was -- to give contributions in this respect and to give salary raises. That is not stating only what the article says but that is placing emphasis of some proof as to his ability to interpret the law. And I think that is wrong. I am not mistrialing this case --

MR. RYAN: Well, with some instruction, your Honor --

MR. PATTISON: I think we should wait for the

record.

THE COURT: I see problems.

MR. PATTISON: I think it clearly must be used not for the truth of what he said but for the fact that it was said. I can think of no other way in which --

THE COURT: I hate to substitute my judgment for that discretionary judgment of the jury. But I have a feeling as a human being that if I were sitting on the jury that I would of necessity accept the statement that was being made as a truthful statement. I am not saying I would do it as a judge, but I am saying as an ordinary person, assuming I knew as little law as these jurors know -- what would be the reason for saying that this man's opinion as an expert says --

MR. PATTISON: I don't think that was said, your Honor. As a matter of fact I am sure it was not.

THE COURT: You know, Mr. Pattison, when I heard it I just looked up, but --

MR. PATTISON: Your Honor, I would just point out one other thing, how else coudl the point be made? In other words, the article -- please, please, Mr. Ryan, let me make this point. The point is --

THE COURT: It is a dangerous thing to do.

Why make a case a problem --

MR. PATTISON: We understand that, your Honor, but there is no other way to say it.

MR. KORMAN: Not only that, Judge, but I do not think anyone disputes the accuracy of that statment of law.

THE COURT: Whether it is disputed or not, that is not the problem, but the problem is whether or not the jury should be told that this is an expert whose opinion they must accept. And that is wrong, because he did not take the witness stand.

MR. NAFTALIS: Your Honor, I wanted to add something else --

THE COURT: Absolutely wrong.

MR. NAFTALIS: -- Mr. Katzberg, I believe, on two occasions indicated first that the article puts these three defendants directly on notice that their system was wrong and indicated Mr. Clifford had read the Wall Street Journal article.

MR. PATTISON: Your Honor --

MR. NAFTALIS: Whatever the minutes show.

THE COURT: We must await the minutes. Let's carry on. I will deny the motion.

MR. BANNIGAN: The record is clear.

MR. RYAN: There may be an appropriate

instruction that can be given during the charge.

THE COURT: I think there has to be an appropriate instruction as to that portion of the expert's opinion.

MR. COHN: Let the record show I join in all the motions.

THE COURT: If you wish to join each other in writing it out you may do so.

MR. COHN: Right. I also join in the motion for a mistrial on the grounds, as your Honor stated, in his comment on the Wall Street Journal article as it related to the summation.

MR. NAFTALIS: Just one or two other points for the record. First, your Honor, I would move for a mistrial also on the ground Mr. Katzberg told the jury in referring to that chart, and about which there have been some disputes about this earlier, that based on this chart, and so on and so forth, there is no question that over $200,000 in illegal contributions were made. If your Honor recalls at the time of the admission of the chart Mr. Katzberg conceded before your Honor that $100,000 or approximately one-third of the dollar figure on that chart did not constitute, even under the Government's theory of the case, illegal political contributions.

MR. PATTISON: That is 200,000.

THE COURT: I see no tremendous injury on that.

MR. NAFTALIS: Thank you, your Honor.

THE COURT: All right, bring the jury in.

(The jury thereupon returned to the courtroom at 2:30 o'clock p.m.)

THE COURT: All right.

MR. NAFTALIS: May I proceed?

THECOURT: Yes, Mr. Naftalis.

MR. NAFTALIS: Judge Costantino, Mr. Katzberg, Mr. Pattison, Mr. Ventura, ladies and gentlemen of the jury, at the outset let me thank you very much for all the courtesy and attention you have shown to all the lawyers in this case and all the witnesses in this case, and all the parties in this case. And on behalf of all the lawyers I wish to express my appreciation to you for all that.

I would also like to express my personal appreciation to you for your patience and courtesy as you sat here during these many weeks of this trial, as these rather tedious, and old, and stale events were unfolded before you.

I also want to thank you ladies and gentlemen for performing what I consider at least as being one of the most important jobs or responsibilities that

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

Plaintiff, :

-against- : CR No. 75-CR-654

PATRICK J. CLIFFORD, DAVID J. DOWD, FRANK B. POWELL and THE SECURITY NATIONAL BANK, :

Defendants. :

- x

Preliminary Statement

This memorandum is submitted on behalf of defendant Security National Bank (the "Bank") in support of its motion to qualify Mr. William T. Holloran as an expert witness and to permit him to testify regarding matters hereinafter set forth.

Facts

There has been substantial testimony at trial that it was the practice of the Security National Bank to request certain officers of the Bank to volunteer to join a contributions program during the years 1967-1974. In most, but not all, instances, if such an officer agreed to participate in the program, he was granted an annual salary increase of $1,700.

There has also been substantial and undisputed testimony that the $1,700 salary increases which were granted to officers who agreed to participate in the contributions program were in several important respects bona fide salary raises. This $1,700 was included in an officer's salary for purposes of computing his pension and life insurance benefits. In addition, several witnesses have testified that there were occasions when they failed to make the requested monthly contribution and applied their salary -- including a portion of the $1,700 annual increase -- wholly to their personal expenses.* Finally, there has been no testimony to the effect that any officer's $1,700 raise was at any time revoked or rescinded as a result of his failure to make requested contributions or for any other reason. Nor has there been any evidence showing that any officer was required to account for his expenditure of a $1,700 raise received by him.

The Bank proposes to call Mr. William T. Holloran as an expert witness. In response to a hypothetical question

---

* See, e.g. Tr.p. 3242 (McNierney)

based on the foregoing facts, Mr. Holloran will testify in substance that the $1,700 salary increases received by officers of the Bank constituted income which was taxable to them as individuals. The basis for his decision will be that on the facts presented the officers had dominion and control of the $1,700 received by them. Mr. Holloran will also testify in response to a hypothetical question that if the officers did not have dominion and control over any sums received by them, such amounts would not be taxable income to them.

Mr. Holloran's qualifications as an expert on tax law include twenty-two years of service with the Internal Revenue Service ("I.R.S."). His background may be summarized as follows:

1946-1950	Revenue Agent, I.R.S.
1950	Graduated from Law School
1950-1957	Trial Attorney Office of the Chief Counsel I.R.S.
1957-1959	Senior Trial Attorney Office of the Regional Counsel I.R.S. New York, New York
1959-1962	Assistant Regional Counsel I.R.S. Kansas City, Missouri

1962-1968	Assistant Regional Counsel I.R.S. New York, New York
1965-1968	Graduate Study in Tax Law New York University Law School

In the last-mentioned position as Assistant Regional Counsel of the I.R.S. in New York City, Mr. Holloran supervised approximately thirty staff attorneys, and was responsible for overseeing a caseload which numbered approximately two thousand.

Since 1968, Mr. Holloran has been employed as National Director of Taxes by S. D. Leidesdorf & Company, a firm of Certified Public Accountants.

Argument

Rule 702 of the Federal Rules of Evidence governs the receipt of testimony by experts. The rule states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In the present case, the Government alleges that the contributions program instituted and operated by certain

officers of the Bank provided a mechanism whereby Bank funds were expended in violation of 18 U.S.C. §610. It is the Government's theory of the case that although the contributions checks were drawn on the participating officers' individual accounts, the granting of $1,700 salary increases was a sham, and the officers acted as mere conduits of funds which at all times retained their character as Bank property. Clearly, the legal characterization of these salary increases is a fact in issue, indeed a crucial fact. As such, it is a proper subject of expert testimony under the explicit language of Rule 702.

Mr. Holloran's proposed testimony does not concern the ultimate issues in this case. It is worth noting, however, that even if his testimony did relate to an ultimate issue, such testimony would be properly admissible in the discretion of the court under the liberal approach to admissibility of the Federal Rules of Evidence. Rule 704 expressly abolishes the archaic "ultimate issue" rule which was applied in older cases to exclude opinion testimony on the ultimate issues of a case. Rule 704 provides:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Not only is Mr. Holloran's proposed testimony unobjectionable under the new rules; his testimony will, we submit, measurably assist the jury in resolving an issue which involves technical and specialized fields of knowledge.

Historically, courts have permitted expert witnesses to testify for the Government in prosecutions for income tax violations. United States v. Johnson, 319 U.S. 503, 519 (1943); United States v. Caserta, 199 F.2d 905, 908-9 (3rd Cir. 1952); United States v. Augustine, 189 F.2d 587, 589-90 (3rd Cir. 1951). In Shippen v. Commissioner, 274 F.2d 860 (5th Cir. 1960), a civil tax case, the Fifth Circuit reversed a decision of the Tax Court on the ground that the Tax Court had improperly excused an Internal Revenue Service agent from testifying as an expert for the defendant. The court held that the agent should not have been excused simply because he worked for the government, and that "if he had formed a considered judgment or opinion as to [the worthlessness of a debt which was the central issue in the case], that opinion

and the facts subject to disclosure upon which it was based would be most pertinent to the main issue in this case" (at 863).

While the present case does not, of course, involve a prosecution under the Internal Revenue laws, nevertheless the tax consequences of the raises in question are directly relevant* to the question of whose monies were utilized in making the contributions which are the basis of this prosecution, i.e. whether the funds belonged to the Bank or to the officers. Clearly, an expert's opinion regarding the tax consequences of these raises would permit the jury to properly draw an inference as to how these raises should be treated for purposes of this prosecution under §610. For, unless the raise is viewed as the property of an officer, there are no tax consequences to him upon its receipt. Conversely, if and only if the raise is considered the property of the officer will it be treated as his taxable income.

Finally, we submit that on the basis of his education, training and experience, Mr. Holloran is amply

---

* Rule 401, Federal Rules of Evidence, states: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

qualified to testify as an expert regarding the aforementioned subject.

Conclusion

For the foregoing reasons, on behalf of defendant Security National Bank, we respectfully request the court to grant the instant motion to qualify Mr. Holloran as an expert witness and to permit him to testify as such.

Respectfully submitted,

LORD, DAY & LORD
Attorneys for Defendant
Security National Bank
25 Broadway
New York, New York 10004
(212) 344-8480

Of Counsel
Eugene F. Bannigan

Dated April 28, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - -

this capacity. The witness whose testimony is the subject of the instant motion, Mr. George DeGenaro, is now and at all relevant times has been a partner in this law firm. During the period of time in which the firm served as general counsel to the Bank, Mr. DeGenaro frequently communicated with officers of the bank in his capacity as counsel, and rendered legal advice to the Bank on numerous occasions regarding, among other things, the very subject matter of this litigation.

In July, 1975, Mr. DeGenaro was summoned to appear before a Federal Grand Jury which was conducting an investigation which culminated in the indictment of the defendants in the present action. Mr. DeGenaro, prior to his appearance before the Grand Jury on July 23, 1976, discussed such appearance with two of his law partners, Messrs. William Shea and Myles McDonald. Mr. Shea was then a Director of the Bank, but Mr. DeGenaro did not consult with him in that capacity. Rather, he spoke with him as a fellow partner in the same law firm. (Tr. p. 2651)*

---

* The notation "Tr." refers to the trial transcript. The notation "GJ" refers to the transcript of the Grand Jury proceeding.

At no time prior to his appearance before the Grand Jury did Mr. DeGenaro discuss the propriety of his appearance with any officer of the Bank. At no time did he ascertain whether there had been a formal waiver of the attorney-client privilege by the Bank, acting through its Board of Directors. (Tr. pp. 2643, 2651). Indeed, by his own testimony before this court on April 1, 1976, Mr. DeGenaro admitted that the discussions with Messrs. Shea and McDonald concerning his Grand Jury appearance dealt with what position the law firm should take. (Tr. p. 2643).

In his appearance before the Grand Jury, Mr. DeGenaro was asked by Mr. Katzberg, the Assistant United States Attorney conducting the investigation, whether he had discussed the applicability of the attorney-client privilege to his testimony. The following colloquy occurred:

> Q With whom at the bank did you discuss the applicability of the attorney-client privilege?
>
> A I don't know that I discussed it with anybody at the bank.
>
> Q Anybody from the Shea firm discuss it with anybody at the bank?
>
> A Shea and I discussed it ourselves, and I discussed it with Judge McDonald, and it was decided not to assert the privilege.

Q Was any officer, employee or anyone connected with the bank consulted on this matter?

A No.

Q Not Mr. Clifford?

A No.

Q Nor Mr. Dowd?

A No.

Q Nor Mr. Powell?

A No.

Q Nor Mr. Dutra?

A No.

Q Nor Mr. Wulffleff?

A No.
None of those persons are still with the bank.

Q Well, Mr. Stefan?

A I did not discuss it with Mr. Stefan.

Q Mr. Clifford?

A I repeat just as I gave you.

Q And the people who discussed the subpoena were yourself and Mr. Shea and Judge McDonald, who sits outside this morning; it that correct?

A Correct.

Q Anybody else in the firm?

A No. (Tr. pp. 75-76)

Mr. Katzberg then proceeded to question Mr. DeGenaro at length regarding his communications with certain officers

of the Bank, including David J. Dowd and Frank B. Powell, concerning a program instituted by the Bank whereby certain Bank officers were requested to make contributions to various political and civic organizations. Mr. DeGenaro, in response to such questioning, related the substance of such communications and the nature of the legal advice which he had rendered. During his appearance before the Grand Jury, Mr. DeGenaro also turned over to the Government certain documents which he had received from the Bank and which related to requests made by the Bank for legal advice. (GJ p. 74).

Mr. DeGenaro has now been subpoened as a witness by defendants Dowd and Powell. He has been sworn as a witness, and invoked the attorney-client privilege on behalf of the Bank, in the presence of the jury.* Upon examination by the court without the presence of the jury, he has testified that it is his intention to continue to invoke the privilege unless ordered by the court to testify.

At an earlier occasion during the trial, the court has ruled, over the Bank's objection on the ground

---

* The invocation of the privilege in the presence of the jury was objected to by both the Bank's trial counsel and the Government.

of privilege, that a documentary communication from Mr. Powell to Mr. DeGenaro was properly admissible into evidence. This exhibit,* which was read to the jury, consisted of a newspaper clipping on the subject of an I.R.S. investigation into allegedly illegal contribution programs instituted by certain banks other than the Security National Bank. A portion of the article is circled and in the margin appears the message: "George, please call me about this. F. B. Powell." In ruling that this item was admissible, the court stated its basis as follows:

> As to the bank, I do not think we are going to find anything really specific as to its admissibility. However, I have come to this conclusion in reasoning it out: Since Mr. Powell is an officer of the bank and he being the one, of course, they say communicated with the lawyer, I believe under two theories it would be admissible and that privilege has been waived:
>
> One, Mr. Powell being an officer and agent of the bank, any acts that he performed, since the bank cannot speak for itself and can only speak through its employees that have the ability to exercise their discretion, Mr. Powell did have the authority on behalf of the bank.
>
> Secondly, since it is a case of a scheme and design nature, I believe that would give Mr. Powell the authority.
>
> Under those two grounds, I believe it would be admissible against the bank.
>
> (Tr. pp. 2070-71)

---

* Government Exhibit #162

The court also indicated that admissibility of the document could be based on Mr. DeGenaro's earlier appearance and testimony before the Grand Jury.

MR. BANNIGAN: There is a further point: As I understand your ruling, you are now saying that Mr. DeGenaro waived the attorney-client privilege when he appeared before the grand jury; is that right?

THE COURT: I am saying that Mr. DeGenaro did not need an explicit waiver from the bank, an institution created by law, and the persons on trial here are persons representative of that institution, and Mr. Powell having been an officer of the bank -- if it is admissible against him as an officer, his duties and obligations can be attributed to the bank, and it is admissible under those circumstances.

(Tr. p. 2075)

Argument

I. The Bank has standing to assert the attorney-client privilege in this action.

The statutory basis for the assertion of the attorney-client privilege in the federal courts is found in Rule 501, Federal Rules of Evidence, which states in relevant part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

The existence of the attorney-client privilege is so deeply rooted in the common law tradition that more than sixty years ago the Supreme Court was able to state, in United States v. Louisville & Nashville Railroad Co., 236 U.S. 318, 336 (1914) that:

> The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination

> and publication, such enactment would be a practical prohibition upon professional advice and assistance. [citations]

While it has long been assumed that the attorney-client privilege is available to a corporation in the federal courts,* the leading case directly holding to this effect is Radiant Burners, Inc. v. American Gas Association, 320 F.2d 314 (7th Cir.), cert. denied, 375 U.S. 929 (1963). In Radiant Burners, a civil antitrust action in which the availability of the privilege to a corporation was raised in a discovery context, the Seventh Circuit held that:

> A corporation is entitled to the same treatment as any other "client" -- no more and no less. If it seeks legal advice from an attorney, and in that relationship confidentially communicates information relating to the advice sought, it may protect itself from disclosure, absent its waiver thereof. (at 324)

In the present case, there is undisputed evidence that the firm of Shea, Gould, Climenko, Kramer & Casey in which Mr. DeGenaro is a partner, served as general counsel to Security National Bank during the

---

* See, e.g., United States v. Louisville & Nashville Railroad Co. supra, at 336; Belanger v. Alton Box Board Co., 180 F.2d 87, 93-94 (7th Cir. 1950); Georgia-Pacific Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463 (S.D.N.Y. 1956); Radio Corp. of America v. Rayland Corp., 18 F.R.D. 440 (N.D. Ill. 1955).

period from 1967 until the present. This representation established a bona fide relationship of attorney and client between Mr. DeGenaro and the Bank, entitling the Bank to prevent disclosure of all communications between Bank officers and Mr. DeGenaro which fall within the scope of the privilege and as to which the privilege has not been waived. Republic Gear Company v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir. 1967).

2. The testimony which is sought is protected by the attorney-client privilege.

It has been established, by the court's examination of Mr. DeGenaro, that during the period of time in which an attorney-client relationship existed between Shea, Gould and the Bank, defendant David J. Dowd and Frank B. Powell, acting as officers of the Bank and on behalf of the Bank, communicated with Mr. DeGenaro for the purpose of obtaining legal advice (Tr. pp. 2624-47). These communications included discussions relating to the legality of a program instituted by the Bank whereby certain employees were requested to make contributions to various civic and political groups (Tr. p. 2646). It is the Bank's understanding, and we have no information which would

suggest otherwise, that if the individual defendants who have subpoened Mr. DeGenaro are permitted to examine him, testimony will be elicited as to the substance of such communications. There can be little doubt but that such communications between Mr. DeGenaro and Messrs. Dowd and Powell were within the scope of the attorney-client privilege.

A. The communications in issue were those of the Bank itself.

As Senior Vice President and Executive Vice President, respectively, of the Bank, Messrs. Dowd and Powell fell squarely within the definition of "control group" officers whose communications were, in the eyes of the law, the communications of the Bank itself for purpose of defining the scope of the corporation's attorney-client privilege. The "control group" test has been defined as follows in City of Philadelphia v. Westinghouse Electric Corp., 210 F.Supp. 483, 485 (E.D. Pa.), mandamus denied sub nom. General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), cert. denied, 372 U.S. 943 (1963):

> If the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney,

> or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.

B. The communications in issue were within the scope of the attorney-client privilege.

The scope of the privilege itself has been defined as follows by Judge Wyzanski in United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 358-59 (D.D. Mass. 1950):

> "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with the communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client, (b) without the presence of strangers, (c) for the purpose of securing either (i) an opinion on law (ii) legal services, or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." 89 F. Supp. at 358-59.

See, United States v. Bartlett, 449 F.2d 700, 704 (8th Cir. 1971); N.L.R.B. v. Harvey, 349 F.2d 900, 904 (4th Cir. 1965); Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962). The scope of the attorney-client privilege has also been defined in Rule 5-03(b) of the

Proposed Rules of Evidence for the United States District Courts and Magistrates (Tentative Draft, March, 1969):

> General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) made for the purpose of facilitating the rendition of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest.

In the present case, the communications between Messrs. Dowd and Powell and Mr. Donahue were for the purpose of securing legal advice (Tr. pp. 2646-47). Such communications, for all the record reveals, were made in confidence and not in the presence of strangers. Finally, the communications were not "for the purpose of committing a crime or tort" (emphasis added). United Shoe, supra, p. 359.

The fact that the defendants are now on trial for alleged activities regarding which they earlier sought legal advice does not, of itself, vitiate the privilege. This is so because, as the Supreme Court has stated,

> "It is obvious that it would be absurd to say that the privilege could be got

> rid of merely by making a charge of fraud." O'Rourke v. Darbishire, [1920] A.C. 581, 604. To drive the privilege away, there must be 'something to give colour to the charge;' there must be 'prima facie evidence that it has some foundation in fact.' O'Rourke v. Darbishire, loc. cit., supra;"

Clark v. United States, 289 U.S. 1, 15 (1932).

The cases which have permitted disclosure of attorney-client communications under the "unlawful purpose" exception fall into two categories, each distinguishable from the present case.

In one category are those cases in which the attorney himself or a partner of the attorney, is the defendant. See, e.g. U.S. v. Aldridge, 484 F.2d 655 (7th Cir. 1973), cert. denied, 415 U.S. 921 (1974); In re Tyder, 381 F.2d 713 (4th Cir. 1967); see also United States v. Bartlett, 449 F.2d 700 (8th Cir. 1971), cert. denied, 405 U.S. 932 (1972), in which the attorney was named as an unindicted co-conspirator. In the present case, by contrast, no member of the firm of Shea, Gould has been named as a defendant or as an unindicted co-conspirator.

In a second category are cases in which the communications involved advice by the attorney which was designed to aid the client in the commission of a

crime. Union Camp Corporation v. Lewis, 385 F.2d 143 (4th Cir. 1967); United States v. Bob, 106 F.2d 37 (2d Cir. 1939), cert. denied, 308 U.S. 589 (1939). In Bob, the attorney's testimony "related to conversations and communications with Bob during the commission and in furtherance of the crime charged in the indictment...." (at p. 40). In the present case, by contrast, we submit that there is no evidence whatsoever that when Messrs. Dowd and Powell communicated with Mr. DeGenaro, their purpose was to commit a crime, or that his advice was sought in furtherance of a crime. Rather, as Messrs. Dowd and Powell will testify, and as we believe Mr. DeGenaro would testify upon further examination, advice was sought (1) at the outset to determine the legality of various activities, and (2) subsequently to determine whether the law or current interpretations of the law had undergone changes.

3. The Bank's right to assert the attorney-client privilege has not been waived.

The attorney-client privilege which attached to the communications between Messrs. Dowd, Powell and Mr. DeGenaro has not been waived. Although a number of

theories might be advanced to support a finding that such a waiver occurred, all are without support on the facts of the present case.

The general rule regarding waiver of the attorney-client privilege is that "only the client can waive this privilege and, to support a finding of waiver, there must be evidence that he intended to waive it...." Connecticut Mutual Life Insurance Co. v. Shields, 18 F.R.D. 448, 451 (S.D.N.Y. 1955). The corollary of this rule is that the attorney is "'duty-bound to raise the claim in any proceeding in order to protect communications made in confidence.'" Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir. 1967), citing A.B. Dick Co. v. Marr, 95 F.Supp. 83, 101 (S.D.N.Y. 1950), appeal dismissed, 197 F.2d 498 (2d Cir.), cert. denied, 344 U.S. 878 (1952).

Thus, the privilege was not waived when Mr. DeGenaro voluntarily testified before the Grand Jury regarding the communications as to which the privilege is presently asserted. As an attorney, he had no power to waive the privilege on behalf of his client, the Bank. On the contrary, he was required by law and by his ethical obligation* to produce such

---

* See Canon 4, DR4-101(B), Code of Professional Responsibility.

information as he was certain was not privileged; to assert the privilege on the Bank's behalf as to those matters "deemed arguably protected by the attorney-client privilege;" and to request an in camera determination whether as to the information withheld the claimed privilege had merit. In re Grand Jury Subpoena Duces Tecum, 391 F.Supp. 1029 (S.D.N.Y. 1975).

If a waiver is to be found in the present case, it must be traced to the Bank as client. Mr. DeGenaro has testified that he has not at any time received a waiver of the privilege from any officer of the Bank (Tr. p. 2643), assuming arguendo such a waiver would be effective. He has also testified that there has been no waiver of the privilege by the full Board of Directors of the Bank, acting as such (Tr. pp. 2650-51).

In short, he has testified that he determined to appear before the Grand Jury and reveal the confidences of his client after consulting with, and only with, Messrs. Shea and McDonald, his law partners (Tr. p. 2650). Mr. McDonald, having no connection of any sort with the Bank, clearly had no authority to waive the privilege on behalf of the Bank.

With regard to Mr. Shea, Mr. DeGenaro testified that he consulted with him as his law partner, rather than as a Director of the Bank (Tr. p. 2651). This being so, Mr. Shea's recommendation that Mr. DeGenaro appear and testify before the Grand Jury cannot be viewed as an act of the Bank. Moreover, even if it is assumed that Mr. Shea purported to act on behalf of the Bank in waiving the privilege and directing Mr. DeGenaro to testify, such an act on his part would be ineffective.

The composition and powers of the Board of Directors of a national bank are defined as follows in 12 U.S.C. §71:

> The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders....

It has been held that the only powers conferred upon the directors of a national bank are vested in them as a board, and that the assent of individual members of the board acting separately and singly is not the assent of the bank, and does not bind the bank. Fort Scott First National Bank v. Drake, 35 Kan. 564, 11 P. 445 (1886). This is consistent with the universal rule that the Board of Directors of a corporation acts

only as such, and effectuate its decisions pursuant to resolutions properly adopted at duly convened meetings at which a quorum is present. See New York B.C.L. §708; Sterling Industries v. Ball Bearing Pen Corp., 273 App.Div. 460, 77 N.Y.S. 2d 691, reversed on other grounds, 298 N.Y. 483 (1948). It has been held, for example, that an action may not be maintained in the name of a corporation without the authorization of the Board of Directors. Dieselcraft Corp. v. Joca Realty Corp., 161 N.Y.S. 2d 761 (1957). In view of this well-established and longstanding rule that a corporation can act only upon the authorization of the Directors acting jointly as a Board, it is not surprising that there is no case support whatsoever for the proposition that a single Director such as Mr. Shea, acting qua Director, has the power to waive an attorney-client privilege belonging to the corporation.

Nor can it be argued that Mr. Shea's dual role as Director and counsel to the Bank empowered him to waive the Bank's attorney-client privilege. The only case in which a waiver was found in the conduct of an attorney-Director is United States v.

Vehicular Parking, 52 F.Supp. 751 (D.C. Del. 1943). In this case, however, the individual was also a promoter of the corporation and served throughout as one of its general business managers with most of his advice being of a business rather than a legal nature. The case is thus readily distinguishable from the present case, as the following excerpt from the court's opinion reveals:

> "In fact, it appears the offices and principal place of business of the primary defendant were located in the same suite where the attorney had his chambers in Washington, D.C. In this setting, his communications involving business, rather than legal, advice are, therefore, not privileged. As active business manager of defendant Vehicular, he did not, I suspect, wear his lawyer suit when he taxied over to the Department of Justice building and voluntarily turned over to the government the exhibits in controversy as well as the many writings concerning the Vehicular Group of defendants to which Joynt was neither the sender nor receiver. In short, I conclude, when he made delivery of the documents to the Anti-trust Division, he did so as the agent of the corporations involved; patently not as their legal adviser." (emphasis supplied)

Finally, the Bank's attorney-client privilege was not waived by any statements made by Mr. Bannigan as counsel for the Bank in his opening remarks. Mr. Bannigan

stated that he would present evidence showing that the officers who arranged the contributions believed their actions were lawful (Tr. p. 2553); that the firm of Shea, Gould was consulted about the contributions program; and that the defendants acted in good faith and without any willful intent to violate any Federal statute (Tr. p. 2558). At no point in his opening remarks did he state that the defendants would attempt to establish that they had actually relied upon the advice of counsel, nor did he state that any evidence would be presented showing the nature of the legal advice rendered to the Bank by Shea, Gould.

In any event, even had he expressly stated that the Bank would assert a defense based upon the advice of counsel, such a statement would not constitute a waiver by the Bank of the attorney-client privilege. In the first place, a distinction must be drawn between the circumstances in which the privilege will be deemed waived in a criminal, as opposed to a civil, case where the defendant interposes the advice of counsel defense. Concededly, when a defendant in a civil action pleads that he has relied upon advice of

counsel, the attorney-client privilege is waived. See Trans World Airlines, Inc. v. Hughes, 332 F.2d 602 (2d Cir. 1964), cert. dismissed, 380 U.S. 248. The basis for this rule in a civil case is that the statement in a pleading or affidavit is itself evidence.

The situation is entirely different in a criminal case. Here, the statements of counsel are not evidence, and they do not bind a defendant, as the court in the present case has expressly so instructed the jury on numerous occasions. Indeed, in his opening statement Mr. Bannigan himself reminded the jury to "remember also that although the bank intends to offer evidence in this case, it is under no obligation to do so" (Tr. p. 2559).

In a criminal case, the rule is clear that a defendant waives his right to assert the attorney-client privilege only if he testifies as to communications with his attorney, U.S. v. Pauldino, 487 F.2d 127 (10th Cir. 1973), cert. denied, 415 U.S. 981 (1974), or fails to object when his attorney is called to testify, U.S. v. King, 484 F.2d 924 (10th Cir. 1973), cert. denied, 416 U.S. 904 (1974). Neither of these events has occurred in the present case.

Finally, we would stress that the privilege was not and could not be waived by the action of defendants Powell and Dowd in calling Mr. DeGenaro to testify. The privilege was simply not theirs to waive. Thus, in United States v. Piccini, 412 F.2d 591 (2d Cir.), cert. denied, 393 U.S. 917 (1970), the defendant was convicted of fraudulently concealing the assets of a bankrupt corporation of which he was an officer. He argued that the trial court had erred in permitting the corporation's attorney to testify that defendant had instructed him to apply corporate funds to reduce defendant's indebtedness to the attorney. Defendant argued that the communication was privileged, but the Second Circuit rejected this contention, and held that the instruction was given by the defendant "as an officer of the corporation, so that the privilege, if any, was that of the corporation, and may not be availed of by [the defendant]." (at p. 593) The same is true in the present case, and Messrs. Powell and Dowd could neither invoke the privilege nor waive it. The privilege, accordingly, remains intact and may be asserted by the Bank.

Conclusion

For the foregoing reasons, on behalf of defendant Security National Bank, we respectfully request the court to grant the instant motion asserting the attorney-client privilege with respect to the testimony of Mr. George DeGenaro.

Respectfully submitted,

LORD, DAY & LORD
Attorneys for Defendant
Security National Bank
25 Broadway
New York, New York 10004
(212) 344-8480

Of Counsel
Eugene F. Bannigan

Dated April 2, 1976

Clerk, Supreme Court, U.S.
FILED
MAR 7 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. [redacted] 65 532

STANDARD COIL PRODUCTS CO., INC.,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ARTHUR RICHENTHAL
DAVID ABRAMS
SOLOMON P. GLUSHAK
Law Offices of
ARTHUR RICHENTHAL
122 East 42nd Street
New York 17, New York

JAMES D. ST. CLAIR
BLAIR L. PERRY
Law Offices of
HALE AND DORR
60 State Street
Boston 9, Mass.
Attorneys for Petitioner

32 CASE PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2005

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes and Rules Involved	4
Statement of the Case	5
Reasons for Granting the Writ	11
Conclusion	21
Appendix A	1a
Appendix B	5a
Appendix C	30a
Appendix D	32a
Appendix E	46a

CITATIONS

Cases

Carroll v. United States, 354 U. S. 394	16
Ex Parte Farrell, 189 F. 2d 540 (1st Cir.)	16
Forman v. United States, 361 U. S. 416	12
Glasser v. United States, 315 U. S. 60	19
Green v. United States, 335 U. S. 184	11, 13, 17

P.

Heath v. United States, 260 F. 2d 623 (9th Cir.) ..16, 18.
Kepner v. United States, 195 U. S. 100 .....
Logan v. United States, 144 U. S. 263 .....
Marquette Cement Manufacturing Co. v. Federal Trade Commission, 147 F. 2d 589 (7th Cir.) .....
Missouri ex rel. St. Louis B. & M. R. Co. v. Taylor, 266 U. S. 200 .....
Mitchell v. Youell, 130 F. 2d 889 (4th Cir.) .....
Palko v. Connecticut, 302 U. S. 319 .....
Ex parte Pennsylvania, 137 U. S. 451 .....
Roche v. Evaporated Milk Ass'n, 319 U. S. 21 2
United States v. Ball, 163 U. S. 662 ..... 12.
United States v. Gori, 282 F. 2d 43 (2d Cir.), Supreme Court Docket No. 486 ..... 12.
United States v. Maryland Cooperative Milk Producers, Inc., 145 F. Supp. 151 (D.D.C.) .....
United States v. Weissman, 266 U. S. 377 .....14, 17,
United States v. Whitlow, 110 F. Supp. 871 (D.D.C.)

Statutes Cited

18 U.S.C. §371 4
18 U.S.C. §1001 4
18 U.S.C. §3231 3
28 U.S.C. §144 4,
28 U.S.C. §1254(1) .....
28 U.S.C. §1651(a) 4,

Federal Rules of Criminal Procedure Cited

Rule 29(a) 4,
Rule 37(a) .....

IN THE

Supreme Court of the United States

October Term, 1961

No.

STANDARD COIL PRODUCTS CO., INC.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Standard Coil Products Co. Inc., respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the First Circuit entered in this case on February 2, 1961 issuing a writ of mandamus upon petition by the Government directing that the judgment of acquittal of petitioner in a criminal proceeding entered in the United States District Court for the District of Massachusetts by direction of the trial judge (Wyzanski, J.) be vacated and ordering that the case be reassigned for a new trial before another judge.

Opinions Below

There was no formal opinion of the United States District Court. The statement by the District Court to the jury in directing the verdict of acquittal is reproduced in Appendix D, pp. 32a-36a.

The opinion of the Court of Appeals has not yet been reported. It is printed as Appendix B to this petition, at pages 5a-29a.

Jurisdiction

The order of the Court of Appeals was entered on February 2, 1961 (Appendix C, pp. 30a-31a). On February 28, 1961, Mr. Justice Frankfurter extended the time within which this petition might be filed to March 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).[1]

Questions Presented

1. Whether the double jeopardy clause of the Fifth Amendment of the Constitution of the United States bars a new trial of the defendant for the same alleged federal crime after a judgment of acquittal has been entered in the previous trial before a federal court of competent jurisdiction, where, in the previous trial, a jury was impaneled and sworn, the Government presented evidence for seven days, the trial court directed a judgment of acquittal before the close of the Government's case, the jury was discharged and the defendant was freed.

2. Whether the Court of Appeals has jurisdiction, upon petition by the Government, to issue mandamus directing that a judgment of acquittal entered in a criminal proceeding by order of the trial judge be vacated and directing

---

[1] The issuance of the Court of Appeals issuing mandamus is a final judgment in an independent adversary suit. *Missouri ex rel. St. Louis B. & M. R. Co.* v. *Taylor*, 266 U. S. 200, 206 (1924). See *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21 (1943).

that a new trial be had, when no right of appeal exists from such judgment of acquittal.

3. Did the United States District Court have the power during a criminal trial to direct a judgment of acquittal before the close of the Government's case.

4. Did the United States District Court have the power during a criminal trial to direct a judgment of acquittal before the close of the Government's case where:

(i) Evidence was received for seven days; (Tr. 1-718).[2]

(ii) The trial judge found that the Government's two principal witnesses displayed a "lack of awareness or lack of capacity in connection with their testimonial obligations" (Appendix D, p. 33a);

(iii) The trial judge found that it was prejudicial to the defendants when one of such witnesses changed his testimony with respect to a vital date in the Government's case as a result of a talk with the prosecuting Government attorney during an overnight recess (Appendix D, p. 35a); and

(iv) the trial judge concluded that justice required him to grant the defendants' motion for a judgment of acquittal (Appendix D, pp. 35a-36a).

5. Whether the Court of Appeals in a mandamus proceeding may review and vacate a judgment of acquittal directed by a trial court of competent jurisdiction if it determines that the trial court did so erroneously.

---

[2] The reference "Tr." is to the transcript of the trial proceedings.

6. Did the Court of Appeals commit error in determining that the trial judge acted improperly in directing a verdict of acquittal.

7. Did the Court of Appeals commit error in disqualifying Judge Wyzanski from presiding at the new criminal trial directed by the Court of Appeals absent any such request by the Government and without compliance with 28 U.S.C. §144.

Constitutional Provisions, Statutes and Federal Rules Involved

The constitutional provision involved is the double jeopardy clause of the Fifth Amendment, providing as follows:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ."

The following statutes are involved and are printed as Appendix A to this petition, page 1a:

18 U.S.C. Sections 371 and 1001, under which the petitioners were indicted and convicted.

18 U.S.C., Section 3231, conferring jurisdiction upon the District Court.

28 U.S.C. Section 1651(a), under which the Court of Appeals purported to issue its writ of mandamus.

28 U.S.C., Section 144, which provides the conditions for disqualification of a trial judge.

Federal Rules of Criminal Procedure, Rules 29(a), 37(a).

Office-Supreme Court, U.S.
FILED
NOV 24 1961
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 65

STANDARD COIL PRODUCTS CO., INC.,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR STANDARD COIL PRODUCTS CO., INC.

ARTHUR RICHENTHAL
Attorney for Petitioner
122 East 42nd Street
New York 17, New York

Of Counsel:

DAVID ABRAMS
NORMAN SOLOVAY

Law Offices of
ARTHUR RICHENTHAL

JAMES D. ST. CLAIR

Law Offices of
HALE AND DORR
60 State Street
Boston 9, Mass.

BA 310

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provision, Statutes and Federal Rules Involved	2
Statement	3
Proceedings Before the District Court	3
Proceedings Before the Circuit Court	8
Summary of Argument	13
Argument	20
I. It was improper for the court below to issue mandamus reviewing and vacating the judgment of acquittal directed by the trial court	20
A. The Issuance of the Writ of Mandamus Was Not "In Aid Of" the Circuit Court's Appellate Jurisdiction	21
B. The Issuance of Mandamus by the Court Below Violates the Basic Principle That Mandamus Will Not Lie to Review the Exercise of Judicial Discretion by an Inferior Court	22
C. The District Court's Direction of a Judgment of Acquittal Was Not Erroneous	24
D. Even if the District Court Committed Error It Was Not Acting Beyond Its Jurisdiction in Directing a Judgment of Acquittal	33

PAGE

(1) A District Court Has the Inherent Power to Direct a Judgment of Acquittal at Any Stage of a Criminal Trial 34

(2) The Government Was Not Deprived of a Jury Trial in the Present Case 42

(3) Rule 29(a) of the Federal Rules of Criminal Procedure Does Not Affect a Trial Court's Power to Direct an Acquittal at Any Stage of the Proceeding 44

E. Mandamus Does Not Lie Where Both Statutory and Common Law Policy Prohibit Appellate Review 47

II. The issuance of mandamus by the court below vacating the judgment of acquittal and ordering a new trial places petitioner in jeopardy in violation of the Fifth Amendment 52

A. The Judgment of Acquittal Directed by the District Court, Irrespective of How Improper It May Have Been, Constitutionally Bars a Retrial of Petitioner 52

B. Defendants Having Once Been Placed in Jeopardy Cannot Be Tried Again Even if the Judgment of Acquittal Could Be Considered a Nullity or Deemed an Order of Mistrial 56

Conclusion 64

Appendix A 1a

BA 312

Questions Presented

Whether it was proper for a circuit court of appeals to issue a writ of mandamus vacating a judgment of acquittal directed by a district court on the eighth day of a criminal trial where the district court had concluded prior to the close of the Government's case that there had been testimonial deficiencies on the part of key Government witnesses, improper conduct by Government counsel with respect to a vital aspect of one part of the Government's case and that an acquittal was required in the interests of justice.

Whether, on the above facts, jeopardy attached within the meaning of the Fifth Amendment, so as to bar the circuit court from issuing mandamus vacating the judgment of acquittal and ordering a new trial.

Constitutional Provision, Statutes and Federal Rules Involved

U. S. Const. amendment V provides in pertinent part:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ."

The applicable provisions of the following statutes and Federal Rules of Criminal Procedure are quoted *infra* in Appendix A:

"All writs" statute, 28 U. S. C. §1651(a).
Criminal Appeals Act, 18 U. S. C. §3731.
Federal Rules of Criminal Procedure, 29(a) and 37(a).

BA 313

SUMMARY OF ARGUMENT

I.

Mandamus was improperly issued by the Circuit Court.

A. The "all writs" statute, 28 U. S. C. §1651(a) (*infra*, Appendix A) empowers circuit courts of appeal to issue a writ of mandamus only when "in aid of" their appellate jurisdiction. *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 25 (1943); *Whitney* v. *Dick*, 202 U. S. 132, 136-137 (1906). Any actual or potential appellate jurisdiction in the court below was extinguished by the judgment of acquittal directed by the trial court, in a case properly before it, from which acquittal the Criminal Appeals Act, 18 U. S. C. §3731 (*infra*, Appendix A) authorizes no review at the instance of the Government. Accordingly, there was no appellate jurisdiction "in aid of" which the circuit court could issue the writ.

B. The "all writs" statute permits the issuance of a writ of mandamus only if "agreeable to the usages and principles of law." The writ may not be used to review an exercise of discretion or judgment by a trial court in respect of a case properly before it. *Ex parte Perry*, 102 U. S. 183 (1879). In the present case, the district court's direction of an acquittal in response to defendants' motions constituted such an exercise of judgment. The Government's use of the extraordinary process of mandamus in this case is not to compel action by a competent tribunal, but for the improper purpose of reviewing and reversing an alleged error committed in the course of a trial. This is not the office of a writ of mandamus. *Ex parte Newman*, 14 Wall. 152, 169 (1872). Nor can the issuance of the writ in the present case be justified by labeling the judgment

of acquittal as a "mistrial." Previous similar Government attempts in criminal cases to fictitiously label judgments entered by trial courts in order to obtain a right of review for the Government have been regularly defeated by this Court. See *Carroll* v. *United States*, 354 U. S. 394, 406 (1957); *United States* v. *Carter*, 231 U. S. 492, 494 (1913). Moreover, resort to such a fiction is factually barred in the present case because at the time the acquittal was directed, the posture of the trial was such that petitioner would in no event have requested or consented to a mistrial.

C. The starting point from which the circuit court reached its final conclusion that the acquittal was a "nullity" was its opinion that the trial judge interfered with the Government's presentation of its case by his extensive questioning and had no basis for criticizing the prosecuting attorney for instigating, during a recess, a change in the testimony of an alleged co-conspirator. However, as the Government itself recognized (R. 70), it was first necessary to clearly show the proper testing procedures before the Government could hope to prove that improper tests had been made. The technical nature, combined with the ineffective presentation of the Government's case, made it the duty of the trial court to extensively question the Government's witnesses in an attempt to elicit "a fair picture" (R. 172). Moreover the record fully supports the trial court's finding that the Government witnesses "showed a lamentable lack of awareness or lack of capacity in connection with their testimonial obligations" (R. 573). Furthermore, the trial court's criticism of the conduct of Government counsel for failing to conform to the high standards of fairness required of the Government in a criminal prosecution was justified particularly where the changed testimony of the alleged co-conspirator induced out-of-court by the Government involved the heart of the Government's

charge that petitioner had conspired to conceal the allegedly improper tests. For these reasons, the trial court, on the eighth day of trial, properly directed an acquittal in the interests of justice.

D. Assuming the trial court improperly directed an acquittal, this error was not of a jurisdictional nature. The power to decide encompasses the power to decide wrongly, no matter how serious or fundamental the error. *Lamar* v. *United States*, 240 U. S. 60, 64-65 (1916). A trial court having jurisdiction over the offense charged and the defendant, has the power to direct a judgment of acquittal at any stage of the trial. *United States* v. *Weissman*, 266 U. S. 377 (1924). A district court judge has the power to direct an acquittal even before the presentation of any evidence, *Best* v. *District of Columbia*, 291 U. S. 411, 415 (1934); *United States* v. *Heath*, 260 F. 2d 623 (9th Cir. 1958), and even after a jury verdict of conviction, *Umbriaco* v. *United States*, 258 F. 2d 625, 626 (9th Cir. 1958). It would be unreasonable and illogical to hold that this power is abated once the presentation of the evidence begins and is resurrected only when the Government concludes its case. Nor is there any support in authority or reason for depriving a trial court of power to direct an acquittal because of improper conduct by the prosecutor. The rationale of this Court's recent decision in *Gori* v. *United States*, 367 U. S. 364 (1961), is that the trial court should be left free to take such action as, in its "sensitive judgment," it believes necessary for the "more effective protection of the criminal accused."

The dangers of such judicial power being abused by whimsical or arbitrary federal trial judges are more imaginary than real. In any event, making a sacrifice of the deep-rooted principle of our criminal law which accords non-reviewable status to a judgment of acquittal,

will not give effective protection against them. On the other hand, very real dangers to the administration of criminal justice may flow from the constricted view of a trial court's power taken by the court below, opening the door wide to collateral attacks which may be brought in some other court at some unknown time in the future, on an unpredictable number of judicial rulings and decisions.

There is no validity in the Government's assertion that the trial court's direction of an acquittal should be treated as a nullity because it allegedly deprived the Government of a "fundamental" right to a jury trial. Assuming the Government has a right to a trial by jury in a criminal case, this right encompasses a trial before a judge and a jury, and even an erroneous ruling on a legal issue by a trial court which takes the case away from the jury cannot be considered a deprivation of the right to trial by jury. *Ex parte United States*, 101 F. 2d 870, 874-77 (7th Cir. 1939), *aff'd sub nom. United States* v. *Stone*, 308 U. S. 519 (1939); see *Sunal* v. *Large*, 332 U. S. 174 (1947).

Similarly without merit is the Government's contention that Rule 29(a) of the Federal Rules of Criminal Procedure was intended to be of jurisdictional stature and *sub silentio* overrule *United States* v. *Weissman*, *supra*. This Rule does not expressly limit the time at which a trial court may direct an acquittal, and accordingly, in conformity with general canons of construction applied to procedural rules or statutes pertaining to the judiciary, no such jurisdictional limitation may be read into it. *Fauntleroy* v. *Lum*, 210 U. S. 230, 234-235 (1908). Furthermore, the Notes of the Advisory Committee appended to Rule 29(a) indicate that no change in the law was intended by its adoption. Moreover, other rules governing federal criminal procedure and analogous procedural rules which have come before the courts have been held not to abrogate or circumscribe

the jurisdictional power of a trial judge, *Ex parte United States, supra; United States* v. *Apex Distributing Company,* 270 F. 2d 747, 754 n. 17 (9th Cir. 1959), and this Court has implicitly recognized the non-jurisdictional nature of Rule 29 by characterizing its violation as "an error of law." *Bryan* v. *United States,* 338 U. S. 552, 559 (1950).

E. Even in a normally appropriate situation, mandamus will not lie if appellate review is prohibited by statutory policy. In such cases, this Court has held that the statutory policy cannot be nullified through resort to mandamus in lieu of appeal. *Interstate Commerce Commission* v. *United States,* 289 U. S. 385, 394 (1933); *Ex parte Pennsylvania Company,* 137 U. S. 451 (1890). The Criminal Appeals Act contains no authorization for appeal by the Government from a judgment of acquittal. Its legislative history in the context of its common law background indicates a clear intent to confine the Government's right of criminal appellate review to those specific instances enumerated in that statute. *Carroll* v. *United States,* 354 U. S. 394, 398-407 (1957); *United States* v. *Mersky,* 361 U. S. 431, 446-453 (1960). As indicated by this Court in *United States* v. *Weissman,* 266 U. S. 377 (1924), this restrictive intent encompasses a prohibition against review of a directed judgment of acquittal, no matter how erroneous or precipitous. In view of this restrictive congressional and common law policy which is rooted in the constitutional safeguard against double jeopardy, the Criminal Appeals Act should be interpreted as prohibiting review of a judgment of acquittal by mandamus as well as appeal.

II.

Double jeopardy is a constitutional bar to the second trial ordered by the circuit court.

A. The plea of *autrefois acquit* is available to petitioner as protection against a second trial by virtue of the trial court's direction of a judgment of acquittal. The history of the plea, as incorporated in the Fifth Amendment, indicates that it is in no way impaired by any errors, irrespective of how extreme, that may have been committed in the course of a trial, including an arbitrary direction of an acquittal. *Green* v. *United States*, 355 U. S. 184, 188 (1957). State courts, which have had more occasion to consider the question of whether double jeopardy bars a second trial after an erroneous and premature direction of acquittal in the first trial, have repeatedly and uniformly held in the affirmative. The only three situations that have been recognized, either in English or American criminal jurisprudence, where a former acquittal is not a bar to a second trial, are not pertinent to the present case. Moreover, they involve situations where the defendant had never been in peril of a valid conviction or in actual danger of punishment and are, therefore, critically different from the present case where petitioner clearly was in such jeopardy.

B. Even if the acquittal directed by the district court was beyond its power or could be deemed the equivalent of an order of mistrial, petitioner may not be constitutionally subjected to a second trial. Petitioner, having been subject to the peril of a valid conviction and the actual danger of punishment, was concededly in jeopardy during the eight days of the trial and, in fact, from the time it was put to trial until the trial was terminated thirteen

days later. Furthermore, even if the acquittal, as the Government argues, be considered no more than an order of a mistrial, the result of permitting petitioner to be retried would be to give the Government a more favorable opportunity at a second trial to convict petitioner. It is clear that where, as in the present case, the trial has been progressing so favorably for the defendants that the trial court expressed its opinion that the jury would not convict, a mistrial cannot be for the effective protection of the defendant, *cf. Gori* v. *United States*, 367 U. S. 364 (1961) but can only be of help to the prosecution whose case is going badly. A termination of a trial under these circumstances cannot be effective to deprive petitioner of the safeguard of the Fifth Amendment against a second prosecution. *Green* v. *United States*, 355 U. S. 184, 188 (1957). Nor can petitioner's motion for an acquittal be deemed to have waived his constitutional right against being "twice put in jeopardy." Petitioner did not ask for a mistrial and in fact would have vigorously opposed such "relief." Implying a fictional consent by petitioner to a mistrial not only runs contrary to the realities of the posture of the trial below but is also violative of the established principle that constitutional rights will not lightly be presumed to have been waived. *Glasser* v. *United States*, 315 U. S. 60, 70 (1942); *Green* v. *United States*, *supra* at pp. 191-197.

should be held to bar the circuit court from reviewing and vacating by mandamus the judgment of acquittal in the district court below.

II.

The issuance of mandamus by the court below vacating the judgment of acquittal and ordering a new trial places petitioner twice in jeopardy in violation of the Fifth Amendment.

A. The Judgment of Acquittal Directed by the District Court, Irrespective of How Improper It May Have Been, Constitutionally Bars a Retrial of Petitioner.

The writ of mandamus issued by the court below vacating the judgment of acquittal and ordering petitioner to be retried for the same offense places petitioner twice in jeopardy in violation of the Fifth Amendment.*

Historically, the primary content of double jeopardy, as incorporated in the Fifth Amendment, was the common law plea of *autrefois acquit* or *convict*, a plea which lay where there had been a verdict of innocence or guilt. The plea of *autrefois acquit*, or a former acquittal, states Blackstone in 4 Blackstone's Commentaries 335:

---

* Petitioner corporation is a "person" entitled to the Constitutional safeguard under the Fifth Amendment against being "twice put in jeopardy." *United States* v. *Glidden Co.*, 78 F. 2d 639 (6th Cir. 1935); *United States* v. *United States Industrial Alcohol Co.*, 15 F. Supp. 784 (D. C. Md. 1936), *rev'd* on other grounds, 103 F. 2d 97 (4th Cir. 1939). See also *United States* v. *M'Ilie*, 194 Fed. 894, 898 (N. D. Ill. 1912). This is the only reasonable construction of the double jeopardy provision of the Fifth Amendment since its rationale "that the State with all its resources and power should not be allowed to make repeated attempts to convict", *Green* v. *United States*, 355 U. S. 184, 187 (1957), or to impose successive punitive sanctions, is as applicable to a corporation as to an individual.

"is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence; and hence it is allowed as a consequence that when a man is once fairly found not guilty upon any indictment or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime."

This Court early declared that the double jeopardy provision contained in the Fifth Amendment, being founded upon the common law pleas of *autrefois acquit* or a former acquittal and *autrefois convict* or a former conviction, barred a second prosecution for the same offense. In *Ex parte Lange*, 18 Wall. 163, 169 (1874), this Court said:

> "The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.
>
> "Hence to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute, a plea of *autrefois acquit* or *autrefois convict* is a good defence."

After reviewing the English and American state authorities, this Court in *Ball* v. *United States*, 163 U. S. 662, 671 (1896), said:

> "As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution. However it may be in England, in this country

> a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence."

In *Kepner* v. *United States*, 195 U. S. 100 (1904), this Court, finding that Congress made applicable to the Philippine Islands a double jeopardy provision similar in wording and exact in meaning to the Fifth Amendment, held that a defendant was placed twice in jeopardy if an appellate court reviewed and reversed a trial court's verdict of acquittal for the defendant. More recently, this Court reaffirmed, in *Green* v. *United States*, 355 U. S. 184 (1957), that the Fifth Amendment prohibits review in an appellate court or a retrial after a verdict of acquittal.

Under this long line of decisions by this Court, an acquittal, whether infected with error or free of error, stands as a constitutional bar to appellate review or retrial of a defendant. As was stated by this Court in *Green* v. *United States, supra* at p. 188:

> "Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. United States v. Ball (U. S.) supra; Peters v. Hobby, 349 U. S. 331, 344, 345, 99 L. ed. 1129, 1140, 75 S. Ct. 790. Cf. Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 S. Ct. 797, 1 Ann. Cas. 655; United States v. Sanges, 144 U. S. 310, 36 L. ed. 445, 12 S. Ct. 609."

Similarly the courts in those states which have adopted the prohibition against double jeopardy either through a constitutional provision or on common law grounds, have uniformly held that a direction of a verdict of acquittal [illegible] irregular or erroneous, is a bar to a second trial. See, *e.g.*, *State* v. *Taylor*, 180 Ark. 588, 22 S. W. 2d [illegible]; *People* v. [illegible], 38 Cal. 467 (1869); *People* v.

Terrill, 132 Cal. 497, 64 P. 854 (1901); *State* v. *Kelley*, 193 Iowa 62, 186 N. W. 834 (1922); *Commonwealth* v. *Ramey*, 279 Ky. 810, 132 S. W. 2d 342 (1939); *Commonwealth* v. *Ball*, 126 Ky. 542, 104 S. W. 325 (1907); *State* v. *Council West*, 71 N. C. 263 (1874) (common law double jeopardy); *State* v. *Thomson*, 76 N. D. 125, 34 N. W. 2d 80 (1948); *State* v. *DeFord*, 120 Ore. 444, 250 P. 220 (1926); *Belter* v. *State*, 178 Wisc. 57, 189 N. W. 270 (1922).

A striking case illustrative of this fundamental principle is *Commonwealth* v. *Adkins*, 171 Ky. 299, 188 S. W. 401 (1916). Here, the prosecutor, prior to the impanelment of the jury, requested the trial court to grant a postponement because of the temporary unavailability of a key witness. The trial court refused the request. The defendant then requested that the trial proceed. The trial court directed the jury to be impaneled and when the prosecutor, because of the unavailability of his key witness, declined to proceed with the case, the trial court peremptorily instructed the jury to find the defendant not guilty.

The State appealed to the Kentucky Supreme Court under a special statutory provision. The appellate court agreed that the action of the trial court was an "abuse of discretion" and an "exceptional mistake" but nevertheless said (171 Ky. at 303-04, 188 S. W. at 402):

> "Under these circumstances, the situation was precisely the same as if the trial judge had peremptorily instructed the jury to acquit the defendant after the evidence for the Commonwealth was in or at the conclusion of all the evidence and in obedience to such instruction he was acquitted and discharged. Of course in such a state of case the judgment of acquittal would be a bar to another prosecution for the same offense.
>
> The fact that this power places great authority in the hands of the circuit judges does not furnish sufficient reason to depart from the long established rule

> of practice that such a proceeding is a bar to another prosecution for the same offense. The circuit judges of the State are necessarily and properly invested with large power and discretion in directing the control and disposition of criminal cases; and if there should occasionally be a miscarriage of justice on account of an erroneous decision of a judge, an exceptional mistake like this should not be allowed to overturn a firmly settled principle in the administration of the criminal law."

There appear to be only three situations in the history of either English or American criminal jurisprudence where an acquittal in a previous trial has been held not to bar a second prosecution: where the court did not have jurisdiction over the defendant or the offense, where the indictment was so void or defective that a valid judgment could not be entered upon it or where the acquittal was procured by fraud or collusion of the defendant. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 499 (1947).

None of these situations have any relevance to the present case. Moreover, each of these three situations is sharply distinguishable from the present case because the defendants there were never subject to a valid conviction or were factually in no actual danger of appropriate punishment. In contrast, petitioner could have been validly convicted and punished and thus was in jeopardy within the meaning of the Fifth Amendment from the time the trial began.

B. Defendants Having Once Been Placed in Jeopardy Cannot Be Tried Again Even if the Judgment of Acquittal Could Be Considered a Nullity or Deemed an Order of Mistrial.

The court below recognized that a judgment of acquittal cannot be vacated irrespective of how erroneous or irregular. However, the circuit court agreed with the

Governme
case was v
beyond th
reasoned t
would not
ing solely
1942). In t
of habeas
that his st
been tried
Fourteenth
subject to

> "The d
> for in
> that h
> It is s
> a void
> charge
> ecuted."

The relia
placed. The
at the insta
principle, si
States, 163
viction upo
does not pr
court in *Mi*
employed t
conviction
defendant h
in this co
dant's const
court "no lo
conviction r
son v. *Zerb*

Government's contention that the acquittal in the present case was void, holding that it was not only erroneous but beyond the trial court's power. The circuit court then reasoned that since the acquittal was void, a second trial would not place the defendants twice in jeopardy, relying solely upon *Mitchell* v. *Yowell*, 130 F. 2d 880 (4th Cir. 1942). In that case the Fourth Circuit, in granting a writ of habeas corpus releasing a prisoner from custody, held that his state court conviction was "void" because he had been tried without benefit of counsel in violation of the Fourteenth Amendment. The court in noting that he was subject to retrial, said:

> "The defense of prior jeopardy will not protect him, for in holding that the trial was a nullity, we hold that he has not been in jeopardy under the charge. It is settled that an accused is not put in jeopardy by a void judgment of conviction, and that upon his discharge thereunder he may be again arrested and prosecuted." (130 F. 2d at 882.)

The reliance by the court below on this case is misplaced. The *Mitchell* case involved a review of a conviction at the instance of the defendant. It has been a well settled principle, since the decision of this Court in *Ball* v. *United States*, 163 U. S. 662 (1896), that the vacating of a conviction upon the appeal or other application of a defendant does not prevent him from being retried. Moreover, the court in *Mitchell*, by calling the conviction "void," merely employed the traditional language used to characterize a conviction based upon a proceeding in which a convicted defendant had been denied a constitutional right. It is only in this context of the abridgement of a convicted defendant's constitutional rights that this Court has said a trial court "no longer had jurisdiction to proceed" and that the conviction rendered could be called "void." See, *e.g.*, *Johnson* v. *Zerbst*, 304 U. S. 458, 468 (1938).

[illegible] labelling the judgment of acquittal a nullity does not change the fact of petitioner's former jeopardy. The constitutional prohibition against double jeopardy, as developed in the decisions of this Court, means that once an accused has been put to trial he has been placed in jeopardy "whether the accused had suffered punishment or not and whether in the former trial he had been acquitted or convicted," *Ex parte Lange*, 18 Wall. 163, 169 (1874), and whether or not a verdict was rendered at the trial. *Green* v. *United States*, 355 U. S. 183, 188 (1957); *Wade* v. *Hunter*, 336 U. S. 684, 688 (1949). See also *Gori* v. *United States*, 367 U. S. 364, 371-72, n. 3 (dissenting opinion).

Petitioner was actually on trial before a competent tribunal for eight days. A valid conviction could have resulted and petitioner stood in danger of punishment. Therefore, petitioner was clearly in "jeopardy" within the meaning of the Fifth Amendment during all this time, and in fact, from the moment the jury was impanelled on September 8, 1960 until the trial was terminated and the jury excused on September 20, 1960.*

The Government apparently recognizing that calling the judgment of acquittal a nullity does not by itself dispel the constitutional bar of double jeopardy, argues that the judgment of acquittal should be deemed an order of mistrial which the petitioner solicited and consented to.**

Factually this Government theory is untenable. Petitioner did not move for a mistrial; petitioner moved for an acquittal or alternatively to strike Rosenholm's testimony; and petitioner would vigorously have opposed any motion

* Jeopardy is normally said to attach when a jury is impanelled. *Cornero* v. *United States*, 48 F. 2d 69 (9th Cir. 1931).

** [illegible] pp. 33-39

for a mistrial. The trial court did not have before it any request for a mistrial, did not grant a mistrial, and did not intend to grant a mistrial. Moreover, it would have been improper, in the posture the case had assumed during the eight days of trial, for the trial court to have taken such action.

But *arguendo* adopting the Government's theory that the judgment of acquittal should be considered as equivalent to an order of mistrial, petitioner still cannot be constitutionally subjected to a second prosecution.

The guiding principle which has been followed by this Court in determining whether a trial court's discharge of a jury prior to a verdict permits the accused to be subjected to a second trial notwithstanding his having been in jeopardy at the first trial, was laid down in *United States* v. *Perez*, 9 Wheat. 579 (1824). In *Perez*, after the first trial had resulted in a deadlocked jury, this Court held a second trial was permissible, saying (at p. 580):

> "... We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. . . . "

In subsequent cases this Court and the lower federal courts have applied the principle enunciated in *Perez* to permit a second trial only where the first trial was terminated before verdict because of "urgent circumstances" and the ends of justice required the mistrial. See, *e.g.*, *Simmons* v. *United States*, 142 U. S. 148 (1891) (discovery of juror's bias); *Thompson* v. *United States*, 155 U. S. 271 (1894) (disqualification of juror); *Wade* v. *Hunter*, 336 U. S. 684 (1949) (military exigencies causing discontinuance of trial); *United States* v. *Potash*, 118 F. 2d 54 (2d Cir. 1941) (juror ill). However, where a mistrial is declared for the purpose of permitting a prosecutor to improve his case, or even to obtain new witnesses, a second trial is barred. *Cornero* v. *United States*, 48 F. 2d 69 (9th Cir. 1931); *United States* v. *Watson*, 28 Fed. Cas. 499 (No. 16651) (S. D. N. Y. 1869). See *Green* v. *United States*, 355 U. S. 184, 188 (1957).

Last term, in *Gori* v. *United States*, 367 U. S. 364 (1961), this Court was faced with a situation where, on the first day of a trial, the trial court had, on its own motion and without the consent of the defendant, declared a mistrial. The majority of this Court, acting on the premise that the mistrial had been clearly granted "in the sole interest of the defendant," held that the subsequent trial of the defendant was not constitutionally barred. The minority felt that there was not such "imperious necessity" for the mistrial as to permit a second trial. However, no sanction was given by this Court in *Gori* to voiding the constitutional protection against double jeopardy where the effect of the mistrial was other than helpful to the defendant. In fact the majority opinion intimated that where the trial is terminated under circumstances where the case is "going badly" for the prosecution that "affording it another, more favorable op trial would same princip in *Green* v. U it was said court subjec discontinuin not convict."

If the tri present case it is clear th the Governm to convict t the trial in Government judge's stat pression ha Paliatto and in a convict will be "ed on his direct ination, incl inconsistenci that the in inarticulate had induced recreated.

The Gove situation pri court below an acquittal of double je defendants' gous to thei

* Gov. Br. 1

favorable opportunity to convict the accused a second trial would be offensive to the Fifth Amendment. The same principle was given explicit recognition by this Court in *Green* v. *United States*, 355 U. S. 184, 188 (1957), where it was said that double jeopardy would apply if a trial court subjects "a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict."

If the trial court's direction of an acquittal in the present case is considered to be a direction of a mistrial, it is clear that the trial court would then have been giving the Government a second and more favorable opportunity to convict the petitioner. For, there is no question that the trial in the district court was "going badly" for the Government as most strikingly evidenced by the trial judge's stated belief that an ineradicable unfavorable impression had been created by the Government witness Paliatto and that in his opinion the jury would not bring in a conviction. In a new trial the Government witnesses will be "educated" and the forewarned prosecutor can, on his direct examination, blunt the edge of cross-examination, including defendants' use of the witnesses' prior inconsistencies. Thus, at a second trial it is most unlikely that the impact made on the jury by the conflicting and inarticulate testimony of the Government witnesses, which had induced adverse comments by the trial judge, can be recreated.

The Government, notwithstanding the realities of the situation prior to the direction of acquittal, argued in the court below that defendants, by improperly moving for an acquittal, must be deemed to have waived the defense of double jeopardy.* Pursuant to the Government's theory, defendants' action in moving for an acquittal was analogous to their taking an appeal from a conviction, such as in

* Gov. Br. below at pp. 36-39.

Ball v. *United States*, 163 U. S. 662 (1896), or to their consenting to a mistrial, as in *United States* v. *Harriman*, 130 F. Supp. 198, 204 (S. D. N. Y.), *appeal dismissed* 21[illegible] F. 2d 918 (2d Cir. 1955). However, as previously discussed, petitioner did not move for a mistrial and in the posture of the trial such a motion was unthinkable.

The very argument the Government here advances—that a request for a direction of an acquittal which is erroneously granted by the trial court waives the protection of double jeopardy—was also made by a state attorney general and ably answered by the state's highest court in *Commonwealth* v. *Ball*, 126 Ky. 542, 104 S. W. 325 (1907). In this case, the State contended that double jeopardy was waived where a trial court, on a motion for acquittal by the defendant, had erroneously granted the acquittal. The court, in rejecting this theory, said (126 Ky. at 547, 104 S. W. at 326):

> ". . . If the defendant may be tried again when he has been acquitted upon a peremptory instruction asked by him, the same rule should be applied when the instruction, though not in form peremptory, is equivalent to a peremptory instruction, or where the rulings of the court in the admission or rejecting of evidence are equivalent to a peremptory instruction. It is incumbent upon the court to give the jury the whole law of the case, and if the defendant had remained quiescent it would have been the duty of the court to decide the question which was raised by him and instructed the jury upon it. The Constitution guarantees the defendant counsel in the management of his case. The right to the assistance of counsel would be a vain thing if the counsel might not raise such questions as they deemed proper. The guaranty that a person shall not be put twice in jeopardy would amount to but little if he could be tried a second time whenever his acquittal was due to an error of the court committed upon his motion. It is immaterial that the

> circuit judge gave the peremptory instruction on the ground that the court was without jurisdiction. We cannot go into the reasons which actuated him. The fact is that under the instructions of the court the jury have regularly found the defendants not guilty, and they cannot be further prosecuted."

Moreover, decisions of this Court touching on other constitutional rights make it clear that the type of waiver or consent which the Government here urges cannot be implied where the result will be the destruction of petitioner's constitutional right not to be "twice put in jeopardy." *E.g., Green* v. *United States*, 355 U. S. 184, 191-197 (1957); *Glasser* v. *United States*, 315 U. S. 60, 70 (1942).

Thus, whether or not the acquittal was erroneous, or the trial court without power to have directed the acquittal or the judgment of acquittal be considered merely an order of mistrial, petitioner was in jeopardy during the first trial below and cannot constitutionally be made to undergo the oppression and harassment of a second trial under circumstances more favorable to the Government.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals for the First Circuit should be reversed and the writ of mandamus quashed.

Respectfully submitted,

ARTHUR RICHENTHAL
Attorney for Petitioner
122 East 42nd Street
New York 17, New York

Of Counsel:

DAVID ABRAMS
NORMAN SOLOVAY

Law Offices of
ARTHUR RICHENTHAL

JAMES D. ST. CLAIR

Law Offices of
HALE AND DORR
60 State Street
Boston 9, Mass.

STATU

28 U. S. C.

(a) The
Act of Con
priate in a
able to the
1948, c. 64
§90, 63 Stat

18 U. S. C.

An app
States fro
Court of t
following i

From a
ing any ind
where such
validity or
dictment or

From a
insufficiency
decision is
the statute
founded.

From t
bar, when

An appe
States fro
all crimina

Supreme Court, U.S.
FILED
DEC 29 1961
JOHN F. DAVIS, CLERK

Nos. 64 and 65

In the Supreme Court of the United States

OCTOBER TERM, 1961

FONG FOO AND ROBERT KNUPP, PETITIONERS

v.

UNITED STATES OF AMERICA

STANDARD COIL PRODUCTS CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, JR.,
Assistant Attorney General,
STEPHEN J. POLLAK,
Assistant to the Solicitor General,
PHILIP R. MONAHAN,
Attorney,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provision, statute, and rule involved	3
Statement	3
1. The indictment and opening statement	4
2. Palliotto's testimony	6
3. The court's suggestion that the prosecution be abandoned	9
4. Rosenholm's testimony	4
5. Rosenholm's change of testimony as to a date	15
6. The motions for acquittal	17
7. The judgment of acquittal	20
Summary of argument	23
Argument	27
I. The judgment of acquittal was void as in excess of the court's power	27
A. Except where the government acknowledges that it cannot or does not propose to prove a fact deemed by the court essential to conviction, a court is without power to enter a judgment of acquittal until it has heard the evidence of guilt	29
B. Government counsel's conversation with witness Rosenholm during a recess concerning the accuracy of a point in his testimony, as a result of which the witness corrected his testimony, was not a valid basis for acquittal	37
II. Being a nullity, the acquittal is not a bar to the accused's retrial and was properly ordered vacated	41
A. An invalid judgment of acquittal, precisely because it is a nullity, will not support a plea of *autrefois acquit*	41
B. The judgment was properly ordered vacated by the court of appeals in the exercise of its power under the All Writs Act	55

623460—61——1

BA 335

an assertion of non-existent power. The court's action was substantially the same as if he had walked into the courtroom on the first day of trial and directed an acquittal, as Judge Aldrich suggested, "on the basis of some rule of thumb that more than three government questions, asked in good faith, but regarded by the court as irrelevant, had unduly delayed the trial" (R. 63). The judgment, having no foundation in legal power, was a nullity.

II

BEING A NULLITY, THE ACQUITTAL IS NOT A BAR TO THE ACCUSED'S RETRIAL AND WAS PROPERLY ORDERED VACATED

A. AN INVALID JUDGMENT OF ACQUITTAL, PRECISELY BECAUSE IT IS A NULLITY, WILL NOT SUPPORT A PLEA OF *AUTREFOIS ACQUIT*

1. Few principles of the Anglo-American law have a longer history or are more properly revered than the rule that, once acquitted, a man may not be tried again. This Court, we of course agree, must be alert to prevent encroachments upon the rule. On the other hand, as the Court has said, in the field of double jeopardy as in other areas of the law, one must guard against "the mechanical application of an abstract formula" (*Wade* v. *Hunter*, 336 U.S. 684, 691). What petitioners, in essence, ask this Court to do is to apply mechanically the "abstract formula" of the rule of *autrefois acquit* to a unique factual situation never intended to be encompassed by the rule and wholly foreign to its spirit and true purpose. Because the trial court pronounced the formula of "acquittal," they say, the government is barred for-

ever from further prosecutive action—regardless of whether the court had power to take such action,[37] and irrespective of the interests of justice.

The court of appeals, we contend, properly rejected this argument. With Judge Aldrich, we are "unwilling to think that such a totally arbitrary act in the course of trial with no semblance of justification behind it, should deprive the government of its day in court" (R. 63–64). "As against a defendant's right to be free from double jeopardy," as Judge Aldrich observed, "there is the interest of the public in the prosecution and conviction of criminals" (R. 63). We submit that the judgment of the court of appeals, without in any wise trenching upon petitioners' right to be free from double jeopardy, has properly protected this public interest. For it can be said as pertinently in this case as the court of appeals said in *Gori*, that for petitioners "to receive absolution for [their] crime[s] * * * because the judge acted too hastily in [their] interest, would be an injustice to the public in the particular case and a disastrous precedent for the future." *United States* v. *Gori*, 282 F. 2d 43, 48 (C.A. 2), affirmed, 367 U.S. 364.

2. If it be concluded, as we think it must, that the trial court lacked power to enter the judgment of acquittal, it follows that petitioners' contention that the court of appeals was prevented by the principles of double jeopardy from ordering the judgment vacated

---

[37] As noted *infra*, p. 46, note 42, petitioners' arguments on the double jeopardy issue are based in part on the assumption, *arguendo*, that the judgment of acquittal was a nullity.

and the case reassigned for trial (F. Br. 26–42; S. Br. 52-63) should be rejected. As observed by the court of appeals—and on this point there was no dissent—"from our conclusion that the trial judge had no power, that is to say no jurisdiction, to enter judgment of acquittal, it follows under principles too well established to require citation of authorities that the judgment is void—a nullity—and hence affords no basis for the defense of double jeopardy" (R. 58). A judgment having "absolutely no legal force or effect"[38] cannot support a plea of *autrefois acquit*.

We do not contend that the exact issue presented here—whether a judgment of acquittal, void because the trial court acted in excess of its power, bars retrial—has been previously decided in favor of the government. However, neither can the petitioners assert that any court has resolved the issue in their favor. To our knowledge, the precise question has never been presented. The Court is free, therefore, to decide the case as reason and justice dictate. We believe that the right of the accused to be free of oppression in the form of multiple trials does not here demand denial of "the interest of the public in the prosecution and conviction of criminals" (R. 63). Cf. *Ex parte United States*, 287 U.S. 241, 249; *United States* v. *Thompson*, 251 U.S. 407, 415. Both may be preserved without renunciation of the policies which gave rise to the rule and the principles which this Court has declared in previous decisions interpreting its meaning.

[38] Black's Law Dictionary (3d ed.), "Nullity."

It is a well recognized axiom in the law of double jeopardy that the defense of *autrefois acquit* is available only where the accused was acquitted by a tribunal having jurisdiction.[39] "An acquittal before a court having no jurisdiction," as this Court observed in *United States* v. *Ball*, 163 U.S. 662, 669, "is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offence."[40] In *Commonwealth* v. *Peters*, 53 Mass. (12 Met.) 387 (1847)—which the Court cited in the *Ball* case, 163 U.S. at 669, as illustrative of the prin-

[39] *E.g.*, 2 Hawkins, *Pleas of the Crown* (6th ed., 1787), ch. 35, § 1; 1 Chitty, *Criminal Law* (5th Am. ed., 1847), p. 458; 4 Blackstone, *Commentaries* (Lewis ed., 1900), p. 335; 2 Russell, *Crimes and Misdemeanors* (7th ed. 1910), p. 1981; 1 Bishop, Criminal Law (9th ed., 1923), § 1028; Archbold, *Criminal Pleading, Evidence & Practice* (34th ed., 1959), § 438; see American Law Institute, *Administration of the Criminal Law* (Double Jeopardy) (1935), pp. 11, 92.

[40] To like effect are *Strobhar* v. *State*, 55 Fla. 167, 180 (1908); *Paulsen* v. *People*, 195 Ill. 507, 514 (1902); *State* v. *Odell*, 4 Blackf. (Ind.) 156 (1836); *Slater* v. *Commonwealth*, 239 Ky. 620, 623 (1931); *Crawford* v. *State*, 174 Md. 175, 180 (1938); *Commonwealth* v. *Peters*, 53 Mass. (12 Met.) 387, 392 (1847); *State* v. *Rother*, 130 Mont. 357, 363 (1956); *State* v. *Hodgkins*, 42 N.H. 474, 477 (1861); *People ex rel. Hillman* v. *Hull*, 131 N.Y. Misc. 253, 255 (1928); *State* v. *Howell*, 220 S.C. 178, 181 (1951); *Commonwealth* v. *Myers*, 1 Va. Cas. 188, 248-249 (1811).

The principle applies equally to a prior conviction. *Diaz* v. *United States*, 223 U.S. 442, 449. For state cases see American Law Institute, *Administration of the Criminal Law* (Double Jeopardy) (1935), pp. 92-93. Cf. *Mitchell* v. *Youell*, 130 F. 2d 880, 882 (C.A. 4), holding that a prisoner under an invalid state conviction, rendered at a trial in which he was denied the assistance of counsel, was subject to proper retrial by the state authorities.

ciple—the Massachusetts court sustained a state conviction for an offense of which the accused had previously been acquitted by the local federal court. Holding the federal court to have been without jurisdiction of the crime (assault aboard a ship anchored in Boston harbor), the state court ruled that the federal acquittal, being a nullity, was no bar to the state prosecution. "The universal rule," as stated in a comparatively recent study, "is that [an] * * * acquittal in a court having no jurisdiction is not a bar to a prosecution for the same offense in a court having jurisdiction." American Law Institute, *Administration of the Criminal Law* (Double Jeopardy) (1935), p. 92.[4]

[4] On similar grounds the courts have held, both in this country and in England, that an acquittal procured through collusion or fraud (though the tribunal had general jurisdiction of the offense) is not a bar to a subsequent proper trial. See, *e.g.*, *State* v. *Ketchum*, 113 Ark. 68 (1914); *Brackney* v. *State*, 182 Ind. 343, 345 (1914); *State* v. *Green*, 16 Iowa 239 (1864); *McDermott* v. *Commonwealth*, 30 Ky. L. Rep. 1227 (1907); *Price* v. *State*, 104 Miss. 288, 295 (1913); *State* v. *Sweptson*, 79 N.C. 632 (1878); *State* v. *Howell*, 220 S.C. 178, 189 (1951); *The King* v. *Davis*, 12 Mod. 8, 88 Eng. Rep. 1129 (1691); *Rex* v. *Bear*, 2 Salk. 646, 91 Eng. Rep. 547 (1697); *Rex* v. *Furser*, Sayer, 90, 96 Eng. Rep. 813 (1753); *The King* v. *Taylor*, 3 B. & C. 612, 615-616, 107 Eng. Rep. 860, 861 (1825). See 1 Chitty, *Criminal Law* (5th Am. ed., 1847), p. 657; 9 Bacon's Abridgment (1852 ed.), pp. 627-628; 3 Greenleaf, *Evidence* (16th ed., 1899), § 38; Clark, *Criminal Procedure* (2d ed., 1918), pp. 454-455; 1 Bishop, *Criminal Law* (9th ed., 1923), § 1009; American Law Institute, *Administration of the Criminal Law* (Double Jeopardy) (1935), pp. 12, 104.

A collusively procured conviction is similarly ineffective to bar a proper retrial. See cases collected in American Law Institute, *op. cit. supra*, p. 194.

We recognize that the principle of law, as articulated in these cases, is that where the tribunal lacks jurisdiction of the cause its judgment is invalid because it is part of a total proceeding which is invalid. Here, only the judgment was invalid. The court had jurisdiction of the cause in other respects. But we submit that the same principle should apply in both cases, for it makes no difference from the standpoint of double jeopardy whether the prior acquittal was void because the court exceeded its authority generally or because, while authorized to hear the case, it exceeded its powers in rendering the judgment. See *in a*, pp. 46–48. It is the nullity of the prior judgment, not the reason for the nullity, which renders it ineffectual as the basis of a plea of *autrefois acquit*.

3. Petitioners attempt to avoid the force of this principle [42] by pointing out that it developed in cases where the accused, because the acquitting court lacked jurisdiction, was in contemplation of law never in jeopardy at all. They argue that a retrial would subject them to a second jeopardy and that it is the subjecting of a person, for the same offense, to be twice "put in jeopardy" which the constitutional guaranty in terms forbids (F. Br. 28–29, 34–35; S. Br. 56–59). The argument rests on a manipulation of labels and should be rejected. Cf. *Palko* v. *Connecticut*, 302 U.S. 319, 323.

It is true, of course, that petitioners have been in jeopardy. It does not follow, however, that a retrial

[42] Although they do not acknowledge the judgment's invalidity, petitioners argue that they cannot be retried even if it was invalid (F. Br. 30, 34–35; S. Br. 56–58).

will be a second jeopardy. Petitioners err, we submit, in their assumption that the judgment of acquittal terminated the jeopardy which attached when their trial began. If, as we have argued, that judgment was a nullity, it had "absolutely no legal force or effect" (see *supra*, p. 43) and did not terminate petitioners' jeopardy. The retrial ordered by the court of appeals will thus entail, not a second jeopardy, but a continuation of the first.

The government's position involves no novel concept. On the contrary, petitioners' situation is analogous to that of an accused who is required to undergo retrial following a mistrial—whether resulting from the inability of the jury to agree upon a verdict (*United States* v. *Perez*, 9 Wheat. 579; *Logan* v. *United States*, 144 U.S. 263, 297–298; cf. *Dreyer* v. *Illinois*, 187 U.S. 71, 85–86; *Keerl* v. *Montana*, 213 U.S. 135) or from any one of the other causes which this Court has held to constitute adequate bases for such action (*e.g.*, *Simmons* v. *United States*, 142 U.S. 148; *Thompson* v. *United States*, 155 U.S. 271, 273–274; *Wade* v. *Hunter*, 336 U.S. 684; *Gori* v. *United States*, 367 U.S. 364; cf. *Brock* v. *North Carolina*, 344 U.S. 424; *Lovato* v. *New Mexico*, 242 U.S. 199).[43]

[43] Where a new trial is ordered following the reversal of a conviction on appeal, some courts have similarly viewed the second trial as continuing the jeopardy which originally attached. *E.g.*, *State* v. *Keerl*, 33 Mont. 501, 516 (1905), affirmed on other grounds *sub nom. Keerl* v. *Montana*, 213 U.S. 135. Compare the view of Mr. Justice Holmes (concurred in by Justices White and McKenna) in his dissenting opinion in *Kepner* v. *United States*, 195 U.S. 100, 134: "* * * it seems to me that logically and rationally a man cannot be said to be

The situation of the accused in the "mistrial" cases cannot be distinguished on a theory that in those cases the accused "consents" to be retried, whereas here there has been no such consent. Cf. the arguments of petitioners at F. Br. 35–36, 39–42; S. Br. 58–63. In none of the cases cited above did the defendant "consent"—either to retrial or to the declaration of the mistrial. In some, indeed, the mistrial was declared over the defendant's specific objection.* The law is, in short, that a mistrial followed by retrial may be declared in a proper case "without the defendant's consent and even over his objection." *Gori* v. *United States, supra,* 367 U.S. at 368.

The "mistrial" cases also refute the argument of the individual petitioners (F. Br. 35) that their "second trial" will be "undeniably * * * a second jeopardy"

---

more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause." Other courts have treated the new trial as involving a second jeopardy, but one to which the accused consented when he asked that the conviction be set aside. See *Green* v. *United States*, 355 U.S. 184, 189, and cases cited. Whichever be the sounder approach from a theoretical viewpoint, it has of course long been settled that the government has a right to retry a defendant who has obtained a reversal of his conviction on appeal. *United States* v. *Ball*, 163 U.S. 662, 671–672; *Green* v. *United States*, *supra*, at 189.

*See, *e.g.*, *Simmons* v. *United States*, *supra*, 142 U.S. at 149–150; *Brock* v. *North Carolina*, *supra*, 344 U.S. at 425. Petitioners contend that double jeopardy bars retrial where the court has declared a mistrial in aid of the prosecution. It is beyond dispute, however, that the trial court's action here was not taken for this purpose, and, therefore, that, whatever the validity of the proposition, it has no application to this case.

because it will be "impossible to impanel the same jury and resume the same trial." In the cases involving mistrials, the retrials have also been before new juries. Indeed, in the more common type of mistrial, it is precisely because the first jury could not agree that retrial before a new jury is necessary. But the necessity of impaneling a new jury has never been thought inconsistent with the view that the second trial continues the jeopardy which attached at the first trial, or otherwise to present a valid objection to the procedure on double jeopardy grounds.

4. Underlying petitioners' double jeopardy arguments, perhaps, is the notion that it is somehow offensive to basic concepts of fair play to compel an accused whom a court acquitted again to "run the gantlet" [45] regardless of the court's lack of authority to render such a judgment. The situation of such a person, however, does not differ essentially from that of an accused who has won acquittal in a court which is later held to have lacked authority to hear his case, and who must as a result again submit to trial. The necessity and propriety of the latter procedure has, as we have seen, never been questioned. *Supra*, pp. 44–46. See, particularly, *Commonwealth* v. *Peters*, 12 Mete. (53 Mass.) 387 (1847), which was cited with approval by this Court in *United States* v. *Ball*, 163 U.S. 662, 669.

In one important respect, furthermore, petitioners can lay less claim to judicial sympathy than those defendants who have faced a similar prospect in the historically more typical situation just described. In

[45] *Gori* v. *United States*, 367 U.S. 364, 373 (dissenting opinion).

the same respect, the present case differs—to petitioners' disadvantage—from *Gori* v. *United States*, 367 U.S. 364, a decision which, though it involved a declaration of a mistrial rather than a judgment of acquittal, was similar to this case in that the court's order, while purporting to favor the accused, in fact had the effect of subjecting him to the necessity of a second trial. For petitioners, unlike the defendants in *Gori* and the other cases, brought on themselves the necessity for a second trial, by specifically requesting the entry of the judgment of acquittal which makes the new trial necessary.

In *Gori*, the declaration of the mistrial was wholly unsolicited, although made in defendant's interest. 367 U.S. at 365. It could well be, therefore, that if the court in *Gori* had consulted the wishes of the defendant, he might have indicated a preference to proceed with the trial and so avoid the necessity of a second trial. This Court nevertheless sustained the second trial as not barred by the prohibition against double jeopardy. The trial judge in petitioners' case, on the other hand, did not take the action which has resulted in the need for another trial (the rendering of the abortive and unauthorized judgment of acquittal) until the attorneys for all of the defendants had moved for acquittal (R. 569–570, 572; *supra*, pp. 19–20). It is true that the court invited the making of "a motion" (it did not specify what kind of motion it had in

mind"). But the fact remains that the judge did not enter the abortive judgment ending the trial until he was requested to do so. For this reason, we submit, the petitioners themselves are chargeable in some measure with responsibility for the retrial.

5. *Regina* v. *Middlesex Justices* (*Ex parte Director of Public Prosecutions*), [1952] 2 All Eng. Rep. 312,[47] cited by the individual petitioners at F. Br. 32–33, while similar in some respects to the present case, is not a precedent for reversal of the court of appeals. The case arose on a motion by the Attorney General, in the Queen's Bench Division of the High Court, for an order of certiorari quashing an acquittal on a charge of operating a vehicle while under the influence of liquor, and for an order of mandamus directing the justices of the Middlesex Quarter Sessions (where the acquittal had occurred) to try the charge. It was the contention of the Crown that, notwithstanding the acquittal, there had been no real trial.

It appeared that, before the jury had been sworn, the chairman of the Quarter Sessions stated to the prosecuting attorney, within the jurors' hearing, that he had "read the depositions very carefully"[48] and

[46] That the defense attorneys were not sure what kind of "motion" the judge had in mind is evidenced by the fact that one of them moved for acquittal or in the alternative that the testimony of the witness Rosenholm (the witness then on the stand, whose change of testimony had triggered the colloquy which resulted in the acquittals) be stricken (R. 572; *supra*, p. 19, note 16).

[47] The case is reported more fully under a slightly different caption at [1952] 2 Q.B. 758.

[48] These depositions had been taken previously in the "petty sessional court," where the defendant had been afforded the right of cross examination. [1952] 2 Q.B. 758, 764.

Office - Supreme Court, U. S
FILED
MAR 29 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 842

THE PEOPLE OF PUERTO RICO, *Petitioner*,

vs.

THE SHELL CO. (P. R.) LIMITED, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT, AND SUPPORTING BRIEF

WILLIAM CATTRON RIGBY,
Attorney for Petitioner.

FERNANDEZ GARCIA,
Attorney General of Puerto Rico,

[illegible]
Solicitor for the Department of the Interior,
Of Counsel.

BA 347

SUBJECT-INDEX

	Page
PETITION	1-8
Prayer for Writ	1-2
Question Presented	2-3
Statutes	3; and Appendix I, 49-58
Statement	3-6
Opinion of the District Court of San Juan	3-4
Opinion of the Supreme Court of Puerto Rico	4-5
Do: Earlier *United Theatres* Case	5-6
Opinion of Circuit Court of Appeals	6
Contrary Opinions of other courts	6-7
Petitioner's Contention	7
Reasons for granting the writ	7-8
BRIEF IN SUPPORT OF PETITION	9-48
Opinions below	9
Jurisdiction	9
Question Presented	9
Statutes involved	9, and Appendix I, 49-58
Statement	9, and Petition 3-6
Specification of errors to be urged	9-10, and Petition 2-3, 7
Summary of Argument	10-14
Argument	14-48
Point I—The lower courts erred in holding the local insular statute against monopolies repealed or annulled or in any way "invalidated" or "superseded" by the federal anti-trust statutes, the Sherman Act or the Clayton Act	14-15
Point II—The Organic Act grants the Legislature of Puerto Rico "all local legislative powers", to "extend to all matters of a legislative character not locally inapplicable"	15
Point III—The Congress has made no express limitation upon this broad grant in any direction at all pertinent here	15-16
A. If there be any such limitation, it must arise by implication	16
B. And such is respondents' contention, of annulment or limitation by implication, by the federal anti-trust acts	16

BA 348

Page

Point IV—But repeals by implication are not favored 17

Point V—The same rule applies to annulments by implication 18

Point VI—The broad grant of "all local legislative powers" to a Territorial legislature confers as plenary local legislative power as that habitually exercised by the legislature of a State 19-21

Point VII—Within the foregoing rule Puerto Rico is a Territory of the United States 21-22

Point VIII—The legislative power of a State includes police power to promote good order and the general welfare 23

Point IX—Enactment of an anti-monopoly or anti-trust law is an exercise of police power 23

Point X—Neither the Constitution nor legislation by Congress in the same field abrogates the police power of a State, nor limits it further than to prevent conflict or inconsistency between the local statute and Congressional legislation 23-25

Point XI—The same rule applies in relation to Puerto Rico, since, in matters of local regulations, and of exercise of the police power, Puerto Rico possesses the powers of a State, 25-27

Point XII—The foregoing is the line of reasoning of the Montana, Wyoming, Utah, and Oklahoma Courts 26-28

Point XIII—The local Anti-trust and Anti-monopoly act of Puerto Rico is not in conflict with the Federal Anti-trust acts, in any way, 29-30

Point XIV—No possibility of "double jeopardy" 30-31

Point XV—Territorial or insular statute bears same relation to acts of Congress as a corporate by-law to charter provisions, or as resolutions of an executive committee to those of directors, or as city ordinances to State statutes 31-33

B A 349

Page

A. Insular Legislature (and entire insular government) an instrumentality of Congress 32

B. Puerto Rican Acts in existence on March 2, 1917, including local anti-trust act of 1907 here involved, were specifically "continued in force and effect" by Section 57 of Organic Act 33

C. *Do*: Effect; those local Acts practically federal legislation 33

D. Analogous reasoning of Oklahoma Supreme Court in upholding Oklahoma Territorial Anti-trust Act 33

Point XVI—Supreme Court of Puerto Rico and Circuit Court of Appeals misconstrued and misapplied applicable decisions of this court; and Circuit Court of Appeals misunderstood reasoning of Supreme Courts of Montana, Wyoming, Utah, and Oklahoma, with which it expressed disagreement 33-44

Point XVII—Long-continued unanimous and unbroken legislative interpretation of various territorial organic acts, both by territorial legislatures and by the Congress itself, in relation to the question here involved, is entitled to great weight 45-48

1. Territorial legislatures have uniformly interpreted their organic acts granting local legislative power as empowering them to enact local statutes in the same fields in which the Congress may also have legislated by general statutes 45-48

2. Congress has not annulled such territorial statutes 45

3. Congress has itself, in enacting local territorial codes, e.g., for Alaska and for District of Columbia, included sections on the same matters covered by general Congressional legislation for United States at large including the territories, thus impliedly recognizing that there is no necessary inconsistency between such local laws and general laws, if not actually conflicting 45

B A 350

Page

A. Federal criminal code punishes certain offenses when committed in the territories, e.g., adultery, bigamy, etc. 45

B, C, and D. Territorial codes, including Puerto Rico and Hawaii criminal codes, punish same offenses 45-47

E. All such sections of those Territorial codes are void,—as well as all convictions had under them,—if decision of the lower courts in this case is correct 47-48

Conclusion 48

APPENDICES 49-83

Appendix I—Statutes and Constitutional provisions 49-58

Appendix II—Opinion of Puerto Rico Supreme Court in the *United Theatres* case (English translation) 59-61

Appendix III—Contrary opinion of Oklahoma Supreme Court in Territory v. Long Bell Lumber Co. 62-69

Appendix IV—Opinion of Montana Supreme Court in Territory v. Guyot (selling whiskey to a reservation Indian) 70-75

Appendix V—Opinion of Utah Supreme Court in State v. Norman (adultery) 76-83

TABLE OF CASES

Armstrong v. Goyco, 29 F. (2d) 900 22

Atchison, Topeka & Santa Fe Ry. v. Sowers, 213 U. S. 55 36

Allen v. Reed, 10 Okla. 105 Appendix 63

Buffalo Cemetery Assn. v. Buffalo, 118 N. Y. 61 17

Blindell et al. v. Hagen et al. (C.C.) 54 Fed. 40, Appendix 63

Bowman v. Railroad Co., 125 U. S. 465 Appendix 71

Brown v. Houston, 114 U. S. 622 Appendix 71

Barbier v. Connolly, 113 U. S. 27 24

Bartemeyer v. Iowa, 18 Wall. 129 Appendix 73

Beer Co. v. Massachusetts, 97 U. S. 25 Appendix 73

Cope v. Cope, 137 U. S. 682 18,19,33, and Appendix 66,68,82

Clinton v. Englebrecht, 13 Wall. 434 19,20, and Appendix 65,67,79

BA 351

II, *infra*, p. 61), that **there is no conflict between the local law and the federal statute.**

POINT XIV

No possibility of "double jeopardy" is here involved.

In some of the Railway Safety Appliance cases, (*e.g.*, *Texas & Pac. Ry. Co.* v. *Rigsby, supra*, 241 U. S. 33, 41), this court has held the State statute "inconsistent" with the federal statute and, therefore, abrogated or put into abeyance by the act of Congress, because the State statute imposed State penalties for the same or very similar actions or neglects for which the federal statutes likewise provided penalties; whence it followed, inasmuch as the State and the federal government are independent sovereignties, so that a prosecution for the violation of the laws of one of them might not prevent a prosecution for the same action or neglect as a violation of the laws of the other, that, if both sets of laws were to be held valid and applicable to precisely the same action or neglect by an individual or a corporation, an offender might be subjected to cumulative and different and perhaps contradictory penalties under the laws of the two separate sovereignties, and that, therefore, the state statute must be held to be inconsistent in that respect with the federal law, and must, therefore, give way, and be considered unenforcible, so long as the federal statute shall remain in force.

But that rule has no application whatever in considering a territorial statute, which is itself a part of the federal law, and enacted under the authority of the same sovereignty,—the United States,—by the authority of which the Congress itself sits and all of its statutes are enacted.

This court has conclusively settled the rule that in the administration of the laws of the Congress and the local territorial laws acting upon the same person in relation to the same actions which may be offenses against both laws,

there can never be any conflict of jurisdiction between the federal courts and the local territorial courts, or any danger of "double jeopardy" for the offender; but that, on the contrary, the federal courts and the local courts have concurrent jurisdiction in such a case, so that whichever court first takes jurisdiction will retain jurisdiction and will decide the case, and that its judgment, either convicting or acquitting the accused, will fully protect him against any prosecution in the other court (local or federal as the case may be) for the same act as an offense against the other set of laws. *Grafton* v. *United States*, 206 U. S. 333.

Such being the established rule, it follows that the mere fact that any wrongful action, such as bigamy or adultery, —or combination in restraint of trade,—is made an offense both against the local territorial law and also against the general federal law does not, in itself, create any inconsistency between those laws, merely because of the fact that it may expose the offender to prosecution either in the local court, or in the federal court, depending on which court first takes jurisdiction; since he can never be exposed to double or contradictory penalties,—so long only (as is the case here) as the local statute does not prescribe any rule of action contradictory in any way to, or inconsistent with, any rule of action prescribed by the federal statute.

POINT XV

The local insular statute bears substantially the same relation to the Act of Congress that a corporate by-law bears to the provisions of the charter, or the resolutions of an executive committee to those of the board of directors or of the stockholders, or the ordinances of a city council to the acts of a State legislature.

It is the office of such subordinate legislation to supplement and amplify for local purposes the more general legislation of the superior legislative authority; and it is not improper, but is indeed very usual, for such subordinate

REQUEST NO. 7

Liability of Corporation for
Acts of Its Agents

One of the defendants in this case is a corporation. As you know, a corporation may only act by means of or through the actions of its own agents. By agents is meant its own officers or employees.

In order for a corporation to be held criminally responsible for the acts or statements of an agent, it is not necessary that the corporation specifically authorize the agent to commit such acts or make such statements. A corporation is legally bound by the acts and statements of its agents done or made within the scope of their express or apparent authority.

By express authority is meant that type of authority specifically given to an agent by his superior. By apparent authority is meant that type of authority which outsiders would normally and naturally assume that the agent would have, in light of his position with the company and the circumstances surrounding his past conduct while with the company. When the acts of an agent are performed within the scope of his authority, the corporation is held legally responsible for such acts although they may have been performed contrary to the

Liability of Corporation for Acts of Its Agents

instructions of his employer and although such acts may be unlawful.

If you find that the conduct of a particular employee was not within the scope of his express or apparent authority, then it is not binding upon the defendant corporation and the corporation could not be held accountable for it. If you find that the conduct was within the scope of either the express or apparent authority of the employee, then the defendant corporation may be held responsible for it.

In this connection the Government contends that the individual defendants had apparent authority to cause the Bank, through its officers, to make the contributions described in Counts Two through Ten. If you find this to be the case beyond a reasonable doubt, then you may find the defendant Security National Bank guilty on those counts. If, however, you find that the individual defendants lacked both apparent and express authority to have the Bank make the contributions, then you could not convict the Bank. Similarly, if you find that the contributions were made voluntarily by the officers, and not made by the Bank, or have a reasonable doubt as to

Liability of Corporation for Acts of Its Agents

whether the contributions were involuntary, then you must also return a not guilty verdict as to the Bank and the individual defendants.

Adapted in part from the charge of Chief Judge Swygert, in United States v. Standard Oil Co., 316 F.2d, 884 (7th Cir. 1963).

Request No. 4 : Counts 2 through 10 as they relate to the individual defendants

Counts 2 through 10 charge all or some of the three individual defendants with knowingly and wilfully consenting to and causing the Security National Bank to make the specified contributions alleged in those counts. In order to find an individual defendant guilty on any of those counts, you must find, beyond a reasonable doubt, that he knowingly and wilfully consented to or caused the making of the specific contribution by a national bank. Now, the elements of Section 610 which the government must establish beyond a reasonable doubt before an individual defendant may be found guilty are as follows:

First, it must be established that the Security National Bank was a national bank. As I have already stated, this is not disputed. Second, that bank money was used to make the political contribution or expenditure of money in connection with an election. In this regard I charge you that as a matter of law even if a contribution or expenditure was made or received after the election campaign to pay debts incurred by the candidate or committee during the campaign, then that contribution or expenditure was made in connection with that

Request No. 5 - Voluntariness

The statute, 18 USC 610, states that a bank may maintain and administer, and solicit contributions to, a separate segregated fund to be utilized for political purposes. Such contributions must be the personal funds of the contributors, and not the funds of the bank. Furthermore, even if the funds are the personal funds of the contributors, they may not be solicted by coercion, under threat of financial resprisal, or job discrimination, but must be voluntarily given. And this is the only area in which the concept of voluntariness may be considered by you with respect to the elements of the offense.

If you find that the monies expended here were in fact indirect contributions of bank funds, rather than officers personal funds, whether the officers participated voluntarily or not is immaterial.

and the innuendo that is created is that somehow Frank Powell was worried about the article and was conferring with Miss Reedy about it.

THE COURT: I think it is to show knowledge.

MR. KORMAN: I do not think there is anything wrong with it.

THE COURT: It is knowledge previous and it is admissible. That is the only reason for it, not as to the truth of the statements.

MR. RYAN: What happened here is that they are trying to create the impression:

First, that somehow Frank Powell was worried about this article because he talked to her in 1975 after the indictment, and that is totally uncalled for.

There is no basis for it and it creates an unfair inference.

MR. KORMAN: That is for the jury to decide.

THE COURT: I will tell the jury the only purpose for its admission, not for the truth of the statements made in there, but for the purpose of knowledge that they must weigh together with all the other evidence in the case. That is all. No other purpose.

MR. PATTISON: Mr. Powell's knowledge.

THE COURT: Yes.

As a matter of fact, I will use those same words.

MR. RYAN: I'd object to knowledge. Is being offered as a document --

THE COURT: I gave it a very cursory reading --

MR. KORMAN: The only fair charge would be that any of the contents of the article is not being offered for its truth.

MR. BANNIGAN: Why should the article come in?

THE COURT: To show the knowledge of Mr. Powell of the statements therein.

MR. NAFTALIS: Miss Reedy cannot authenticate the article. She was not the author.

MR. KORMAN: If that is the problem, the article appeared in the Wall Street Journal. It is being admitted to show a state of mind.

MR. COHN: Is it part of the Government's proof that Miss Reedy recognizes that to be the article that she and Mr. Powell discussed in 1969? Does she merely recognize the handwriting on the paper? If she cannot testify that she recognizes this as the article involved in that conversation, I do not think they have established a basis for its coming in.

(Continued on next page)

for identification as Court's Exhibit 43.

Four page report dated 3/25/74 marked as Court's Exhibit 44 for identification.

(So marked.)

MR. NAFTALIS: Your Honor, your Honor, there is one other matter before we start, unless you want this later, it doesn't have to be raised now, I just want to raise it sometime this afternoon --

THE COURT: What is that?

MR. NAFTALIS: Your Honor, Mr. Katzberg -- well, we had asked for the names and the statements and the testimony of any witnesses who claimed that their participation was voluntary in the program and whether they received no raise, and Mr. Katzberg had supplied us with eight names of people and also eight FBI statements -- I think the names, well, there are seven or nine, it is a matter of record and the names are a matter of record.

In addition for at least one of them there was Grand Jury testimony as well.

Now before that was to be turned over, your Honor was going to examine that in camera.

I think the man's name is Lowe.

Your Honor, since I'm going to have to start my defense, I have started with Mr. Corriss, but I

was interrupted, and I will have to go back, I imagine I will really start the defense tomorrow and I would like Mr. Lowe's testimony as well as the FBI reports. I haven't seen them.

Now he does say that his participation was voluntary, there was no direct quid pro quo when he received a raise and his participation in the program, so I would ask if your Honor would possibly expedite the decision on whether I could get that or not so that I would then make an informed judgment as to whether to call him.

MR. PATTISON: Your Honor, I believe that at present he has whatever facts he needs to ascertain whether he should call him or not. He can interview him, talk to him or do anything he wants. He knows what he said.

What he really wants now is to know what sort of cross-examination Mr. Lowe might expect and that is not covered any applicable rule which I know of.

MR. NAFTALIS: Most respectfully, your Honor, although I understand Mr. Pattison's argument, we have argued that already and your Honor indicated we could cover the statements, the only caveat which Mr. Katzberg said was that he didn't think it would be appropriate to turn over the Grand Jury testimony without your Honor

initially looking at it and ordering it turned over, and that is the reason we are waiting, not because of Mr. Pattison's argument but because your Honor ordered the turn over of statements and we are waiting on the Grand Jury testimony. You were going to inspect them in camera.

MR. KATZBERG: I don't want to belabor the point but I want the record to be clear that the Grand Jury minutes were turned over for your Honor's in camera inspection to determine whether or not there was an exculpatory material contained therein, and your Honor, as I recall at least, that is with respect to the determination you were to make, the determination was whether or not such material existed and if it existed then it was to be turned over, but if not, then no.

MR. NAFTALIS: Are we saying the same thing?

MR. PATTISON: I would also urge the other point, your Honor, which I just made, and that is what Mr. Naftalis has said, on that basis he can interview him, call him or not, but to get our whole file on him and then ascertain whether he can be cross-examined or not, that is far beyond the rule, Brady doesn't stretch that far.

MR. NAFTALIS: I'm only asking for what his

present statement is regarding this matter.

MR. PATTISON: And you have it.

THE COURT: You have it, I think.

MR. NAFTALIS: I don't have it because his present statement is what he told the FBI, and we have no statement from the FBI, and it seems to me that is the most vital thing to know really --

THE COURT: You have a right to go ask him.

MR. NAFTALIS: Sure, your Honor, but I --

THE COURT: If you are not satisfied with what he said, then come back and come before the Court and if I think you are entitled to it then at that time I will make a further ruling.

MR. NAFTALIS: In any event, the way things were left prior to Mr. Pattison's statement was your Honor was going to examine it to determine whether it was exculpatory.

THE COURT: I will examine it in any event, but that won't affect you at this time. I will examine it.

Are you ready to proceed?

MR. RYAN: I am ready to proceed, your Honor.

THE CLERK: Shall I bring in the jury, your Honor?

THE COURT: Yes, bring in the jury.

(At 2:25 p.m. the jury entered the courtroom.)

MR. RYAN: The defendant Frank Powell calls you William A. Shea.

THE COURT: All right.

WILLIAM A. SHEA, called as a witness on behalf of the defendant Frank Powell, having been duly sworn by the Clerk of the Court, testified as follows:

THE COURT: All right, you may examine.

DIRECT EXAMINATION

BY MR. RYAN:

Q Mr. Shea, you are here pursuant to a subpoena issued on behalf of the defendant Frank Powell; isn't that correct, sir?

A Yes, sir.

Q Do you have the subpoena with you?

A I think Judge MacDonald has it.

MR. RYAN: May I have it, Judge (indicating gentleman in courtroom.)

BY MR. RYAN:

Q To speed up things, Mr. Shea, I assume you looked at the subpoena, it requires the production of certain documents.

Will you see if that is the subpoena, please.

A It looks like it, yes, sir.

#5432

Affidavit of Service by Mail

In re:

United States of America v Security National Bank

State of New York
County of New York, ss.:

Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age. That on SEP 8 - 1976, 197..., he served 1 copy of the within Appendix in the above named matter on the following counsel by enclosing said one copy in a securely sealed postpaid wrapper addressed as follows:

U.S. Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201
(Attorney for Appellant)

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 8th day of Sept. 1976.

Jack A. Messina

JACK A. MESSINA
Notary Public, State of New York
No. 30-2673500
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1977

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

(5432)